# DOCKET

No. 07-474

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| Title: | Anup Engquist, Petitioner<br>v.<br>Oregon Department of Agriculture, et al. |
| Docketed: | October 11, 2007 |
| Lower Ct: | United States Court of Appeals for the Ninth Circuit |
| Case Nos.: | (05-35170, 05-35263) |
| Decision Date: | February 8, 2007 |
| Rehearing Denied: | July 12, 2007 |

Questions Presented

| ~~~Date~~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Oct 5 2007 | Petition for a writ of certiorari filed. (Response due November 13, 2007) |
| Oct 5 2007 | Appendix of Anup Engquist filed (2 Volumes). |
| Nov 6 2007 | Order extending time to file response to petition to and including December 6, 2007. |
| Dec 6 2007 | Brief of respondents Oregon Department of Agriculture, et al. in opposition filed. |
| Dec 17 2007 | Reply of petitioner Anup Engquist filed. (Distributed) |
| Dec 19 2007 | DISTRIBUTED for Conference of January 11, 2008. |
| Jan 11 2008 | Petition GRANTED limited to Question 1 presented by the petition. The brief of petitioner is to be filed on or before Wednesday, February 20, 2008. The brief of respondents is to be filed on or before Wednesday, March 19, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court. |
| Jan 30 2008 | SET FOR ARGUMENT ON Monday, April 21, 2008. |
| Feb 6 2008 | Record received from the U.S.D.C. for the District of Oregon. (2 boxes) |
| Feb 6 2008 | Record received from U.S.C.A. for the Ninth Circuit. (1 envelope) |
| Feb 6 2008 | Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the respondents. |
| Feb 20 2008 | Joint appendix filed. (Statement of costs received) |
| Feb 20 2008 | Brief of petitioner Anup Engquist filed. |
| Feb 20 2008 | Consent to the filing of amicus curiae briefs in support of either party, or neither party, received from counsel for petitioner. |
| Feb 22 2008 | Brief amicus curiae of National Fraternal Order of Police filed. |
| Feb 27 2008 | Brief amici curiae of National Association of Police Organizations, Inc., et al. filed. |
| Feb 27 2008 | Brief amici curiae of Lambda Legal Defense and Education Fund, et al. filed. |
| Feb 27 2008 | Brief amici curiae of Professor Richard Epstein, and Rutherford Institute filed. |
| Feb 27 2008 | Brief amici curiae of National Education Association, et al. filed. |
| Feb 27 2008 | Brief amicus curiae of National Employment Lawyers Association filed. |
| Feb 27 2008 | Brief amicus curiae of Meir J. Westreich filed. |
| Mar 5 2008 | CIRCULATED. |
| Mar 19 2008 | Brief of respondents Oregon Department of Agriculture, et al. filed. (Distributed). |
| Mar 25 2008 | Brief amicus curiae of National School Boards Association filed. (Distributed) |
| Mar 26 2008 | Brief amicus curiae of United States filed. (Distributed) |
| Mar 26 2008 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |

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| Mar 26 2008 | Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed) |
| Mar 26 2008 | Brief amici curiae of League of California Cities, et al. filed. (Distributed) |
| Mar 26 2008 | Brief amici curiae of Pennsylvania, et al. filed. |
| Apr 9 2008 | Reply of petitioner Anup Engquist filed. (Distributed) |
| Apr 11 2008 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Apr 21 2008 | Argued. For petitioner: Neal Katyal, Washington, D.C. For respondents: Janet A. Metcalf, Assistant Attoreny General, Salem, Ore.; and Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) |

# PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 07-474 OCT 5 - 2007

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

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ANUP ENGQUIST,

*Petitioner*

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents*

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On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Ninth Circuit below vacated the jury's verdict in favor of Petitioner Engquist and created a divisive split with the seven Circuits that apply the "rational basis" analysis to public employees who claim their termination was a result of unequal treatment, even if that treatment did not result from the employee's membership in a suspect class. The first question presented is:

1. Whether traditional equal protection "rational basis" analysis under Village of Willowbrook v Olech, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000) applies to public employers who intentionally treat similarly situated employees differently with no rational bases for arbitrary, vindictive or malicious reasons?

The Ninth Circuit also upheld the validity of a state statute that took 60 percent of Engquist's punitive damage award for a public use, aligning the Ninth Circuit with the six state supreme courts that have held such statutes constitutional, and furthering the split with the two state supreme courts that have held such statutes violate the Takings Clause. The second question presented is:

2. Whether a state "split recovery" punitive damages statute violates the Takings Clause of the United States Constitution?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption to the case contains the names of all the parties to this proceeding.

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Anup Engquist respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS AND ORDERS ENTERED IN THIS CASE

The opinion of the Ninth Circuit (App -12-69) is reported at Engquist v Oregon Dept of Agriculture, 478 F3d 985 (2007). The order of the Ninth Circuit denying Ms. Engquist's Petition for Rehearing and Suggestion for Rehearing En Banc is not reported. App - 70. The trial court judgment following an 11 day jury trial is also not reported. App - 8.

## BASIS FOR JURISDICTION OF SUPREME COURT

The Ninth Circuit filed its Opinion on February 8, 2007 and its Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on July 12, 2007. This Court has jurisdiction to review the circuit court's decision on a writ of certiorari under 28 U.S.C. § 1254(1).

## RULES AND STATUTES INVOLVED IN CASE

Relevant portions of the United States Constitution and Oregon Revised Statutes § 31.075 are included in the Appendix. App-72-77.

## INTRODUCTION

This case involves a recognized conflict between the United States Court of Appeals for the Ninth Circuit and seven other Circuits on an issue of substantial and recurring importance - whether traditional rational basis equal protection analysis, the so-called 'class of one' legal theory, applies to public employment decisions.

A divided panel of the Ninth Circuit acknowledged that its holding conflicts directly with decisions of the First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuits, all of which apply the 'class of one' theory to public employment decisions. Engquist, *supra*, 478 F3d at 993 *citing* Scarbrough v Morgan County Bd. Of Educ., 470 F3d 250, 260-61 (6th Cir 2006); Hill v Borough of Kutztown, 455 F3d 225, 239 (3d Cir 2006); Whiting v Univ of Miss, 451 F3d 339, 348-50 (5th Cir 2006); Neilson v D'Angelis, 409 F3d 100, 104 (2d Cir 2005); Levenstein v Salafsky, 414 F3d 767, 775-76 (7th Cir 2005); Campagna v Mass Dep't of Envt'l Prot., 334 F3d 150, 156 (1st Cir 2003); and Bartell v Aurora Public Schools, 263 F3d 1143, 1148-49 (10th Cir 2001).

The dissenting judge noted the circuit split and added that the majority's holding is at odds with this Court's decision in Village of Willowbrook, 528 US 562, 120 S. Ct. 1073, 145 L Ed 2d 1060 (2000). The importance of the question presented, the millions of public employees potentially affected, and the uncertainty in the law that the split of authority creates all counsel strongly in favor of granting petitioner's petition.

This case also involves a recognized conflict in the decisions of eight state supreme courts on the separate issue of whether a state statute that confiscates a portion of a plaintiff's punitive damages award for public use violates the Takings Clause of the United State Constitution. The prevalence of such statutes, and the millions of dollars of wealth transfer that they effect, call for this Court's immediate review of the second question presented as well.

## STATEMENT OF THE CASE

### Facts Relevant to Petition

Anup Engquist, a female born in India, worked as an international food standards specialist for the Expert Service Center (hereinafter "ESC"), a laboratory in the Oregon Department of Agriculture (hereinafter "ODA") from December 1992 until February 2002. Norma Corristan, a female of Mexican descent, was the Director of ODA's Laboratory Services Division including the ESC. Joseph (Jeff) Hyatt worked as a systems analyst in ODA from 1990 until promoted.

Throughout her employment, Engquist had repeated difficulties with Hyatt who withheld information she needed for her job, made numerous false derogatory statements about her to others, and excessively monitored her activities even following her to the ladies room. Engquist complained to Corristan who commenced discipline against Hyatt requiring him to attend diversity training and conflict resolution or anger management training.

When he returned from required training, Hyatt told Corristan it made him angry to have to go.

When a position became vacant to manage the ESC, Hyatt approached Corristan and asked to be promoted. Corristan told him he wasn't ready to be a manager. After being disciplined for his treatment of Engquist and told he wasn't ready to be a manager, Hyatt's goal was to "get rid of" Engquist and Corristan.

In January 2001, John Szczepanski, the Assistant Director of ODA, became Corristan's supervisor. Shortly thereafter, Szczepanski became a Hyatt ally. In approximately May 2001, Szczepanski and Hyatt began a series of acts directed at getting rid of both Corristan and Engquist.

In June 2001, Szczepanski removed Corristan's ESC duties without explanation or justification and inappropriately told a client Corristan and Engquist "would be gotten rid of" and he could not "control" Engquist. At the time, the ESC was extremely successful and viewed nationally as a remarkable institution.

A short time later, Hyatt told a co-worker he was working with Szczepanski on a personnel plan for the ESC and they were "getting rid of Norma and Anup." Later, Hyatt told the same co-worker Szczepanski was working with him rather than others in the ESC because they didn't know who they could trust.

Subsequently, Hyatt inappropriately e-mailed

Szczepanski asking him to alter Engquist's and Corristan's job duties. He drafted a letter for Szczepanski to send to Corristan and told him to "put it into your own words." Hyatt's e-mail was designed to give him the upper hand in an upcoming promotional opportunity for the ESC Manager position. Szczepanski began implementing Hyatt's requests against Corristan and Engquist.

Hyatt and Engquist competed for the Manager job. Although Engquist had more advanced educational degrees and more experience with the scientific and customer service parts of the job and Hyatt did not meet the minimum qualifications for the position, Szczepanski offered the position to Hyatt.

Almost immediately, Hyatt began removing Engquist's duties, excessively monitoring her performance and circulating false statements about her to others.

In December 2001, Szczepanski eliminated Corristan's position claiming he had "unnecessary administrative personnel" in the Division. On January 31, 2002, Engquist was informed her position was being eliminated on February 15, 2002 due to budget cuts. In fact, out of 10 divisions in the ODA at the time of the budget cuts only two full-time employees lost their jobs: Corristan and Engquist. Moreover, trial evidence demonstrated that Engquist's position was not funded with state funds. As a result, the elimination of her position did not help reduce the budget deficit, the purported reason for her release.

Two days before Engquist's last work day, Hyatt offered to hire a former employee and told him that Hyatt had been promised a pay raise and a promotion, that people were willing to work "with Anup and Norma gone", that Anup was "the boss" and Norma was "the enforcer." At trial, Hyatt claimed his statements in the e-mail were false.

After Corristan's and Engquist's terminations, Hyatt told a co-worker, he "couldn't afford to get rid of any more female minorities because he had already gotten rid of two." He named Corristan and Engquist as the two he got rid of. Shortly before Engquist's last day, Szczepanski suggested to Hyatt that they get together on "the significant 15th" for drinks after work. There was no evidence of any significant event on that date other than Engquist's last day of work.

Corristan's case was tried to a jury in state court in November 2003 which resulted in an award of $1.1 million. The jury found Szczepanski and Hyatt liable on rational basis equal protection claims, Hyatt liable for discrimination based upon gender or ethnicity and Hyatt liable for intentional interference with employment.

## Proceedings Below

Engquist sued the ODA, Hyatt and Szczepanski asserting Title VII, §1981 §1983, equal protection, procedural and substantive due process, as well as a state claim for intentional interference with employment.

After the trial court denied the bulk of respondent's summary judgment motions, and following an 11 day jury trial, the jury found against Engquist on her Title VII, § 1981 and her § 1983 claim based upon protected class discrimination but found in favor of Engquist on her rational basis equal protection, substantive due process and intentional interference with employment claims.

The jury awarded Engquist damages of $425,000 consisting of $175,000 in compensatory damages not tied to any claim, $125,000 in punitive damages on the equal protection claim and $125,000 in punitive damages on the intentional interference claim.

The trial court denied Respondents motions for judgment as a matter of law and entered judgment in favor of Engquist. The trial court, over Petitioner's objections, also entered judgment in favor of the Oregon Department of Justice and against the individual defendants for 60 percent of the punitive damages awarded on the state tort claim, or $75,000, pursuant to Oregon Revised Statutes § 31.735.

On appeal, a panel of the Ninth Circuit reversed the trial court's judgment on the equal protection and substantive due process claims, vacated the damages, attorney fees and cost awards based on those claims, and remanded for further proceedings. Although the panel majority acknowledged that this Court recognized in Village of Willowbrook v Olech, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000) that traditional rational

basis equal protection analysis applies to a 'class of one' and that the Ninth Circuit had applied the Olech legal theory in other contexts, it declined to apply the Olech holding to Engquist's equal protection claim. The majority recognized that its position conflicted with that taken by the First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuit courts of appeals.

The dissenting judge remarked that "[e]very other circuit to have considered this question has applied the class-of-one theory to employment." Even before this Court articulated the class-of-one label in Olech, said the dissent, "other circuits recognized it as a straightforward application of equal protection principles. See, e.g., Ciechon v City of Chicago, 686 F 2d 511, 522-23 (7th Cir 1982)." Indeed, the majority could "not identify a single case in [the Ninth Circuit's] equal protection jurisprudence or that of any other circuit that limits equal protection rights in the context of public employment." The dissenting judge saw this case as a simple application of the principle that all government actions must be supported by a rational basis, "even when a protected class is not involved." City of Cleburne v Cleburne Living Center, 473 US 432, 448-49, 105 S Ct 3249, 87 L Ed 2d 313 (1985). The dissenting judge also rejected the majority's claim that the Olech legal theory would destroy the concept of at-will employment in the context of public employees:

> "The application of class-of-one equal protection principles is hardly fatal to at-will employment. The rational basis

> test has always been used to insulate governmental decisions from searching review that would interfere with governmental functions, while still protecting individuals against heinous governmental conduct. The rational basis test can play this role as successfully here as in other equal protection cases. It is certainly not necessary, in order to preserve the concept of at-will employment, to hold that the government may freely treat its employees maliciously and irrationally."
>
> * * *
>
> "Moreover, the experience of other circuits demonstrates that the class-of-one theory of equal protection is not in practice fatal to at-will employment. The seven circuits that have recognized the theory continue to have at-will employment."

Engquist, *supra*, 478 F3d at 1014.

Accordingly, the dissent would have affirmed the jury's verdict: "I certainly would not reject [the class-of-one theory] in favor of a rule that conflicts with that adopted by every other circuit to consider the question." *Id.*

## REASONS FOR GRANTING THE PETITION

This case presents two recurring questions of

national legal and societal importance that this Court has not previously addressed. This Court should grant the petition to resolve the inter-circuit conflict regarding the scope of the Equal Protection Clause and to resolve the split among the state supreme courts regarding the constitutionality of state statutes that appropriate for public use the punitive damages award of private parties in litigation.

## 1. THE NINTH CIRCUIT FAILED TO APPLY THIS COURT'S EQUAL PROTECTION PRECEDENT, AND IN SO DOING, CREATED A CONFLICT BETWEEN THE NINTH CIRCUIT AND SEVEN OTHER CIRCUITS

### A. The Ninth Circuit Over-Reacted To Concerns Over The Impact of Village of Willowbrook v Olech, 528 US 562 (2000)

In Village of Willowbrook v Olech, 528 US 562, 145 L Ed2d 1060, 120 S Ct 1073 (2000), this Court recognized the viability of "....equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The Court held that a complaint alleging a Village demanded a larger easement from a plaintiff than other similarly situated property owners; that the difference in treatment was irrational and wholly arbitrary; and that the Village ultimately relented in accepting a lesser easement was "sufficient to state a

claim for relief under traditional equal protection analysis." Olech, *supra*, 528 US at 565.

Based upon Olech, seven other circuits now permit public employees to state a rational basis equal protection claim against public employers to challenge individual employment decisions. See, Campagna, *supra*, 334 F3d at 156; Neilson, *supra*, 409 F3d at 104; Hill, *supra*, 455 F3d at 239; Whiting, *supra*, 451 F3d at 348-50; Scarbrough, *supra*, 470 F3d at 260-61; Levenstein, *supra*, 414 F3d at 775-75; Bartell, *supra*, 263 F3d at 1148-49 (10th Cir 2001). Until now, no Circuit or District Court had ever held to the contrary,

The Ninth Circuit panel carved out an exception to Olech in the context of public employment, an exception with no basis in the text or reasoning of the Olech opinion or the language of the Equal Protection Clause. Rather, the Ninth Circuit made its ruling based on a purported policy concern that imposing the Olech legal theory on public employment decisions was unnecessary due to the number of legal protections public employees enjoy; would upset the common law 'at will' employment rule; and would generate a flood of cases requiring federal review of a multitude of public agency personnel decisions. Engquist, *supra*, 478 F3d at 995.

The majority's concerns about Olech are not unique to public employment claims. Rather, lower courts express similar concerns about Olech's effect on virtually every area of state and local decision-making. In Jennings v City of Stillwater, 383 F3d

1199, 1211 (10th Cir 2004), for example, the Tenth Circuit described the challenges posed by Olech as,

> "...unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors. It is always possible for persons aggrieved by government action to allege, and almost always possible to produce evidence, that they were treated differently from others, with regard to everything from zoning to licensing to speeding to tax evaluation...This would constitute the federal courts as general second-guessers of the reasonableness of broad areas of state and local decision-making..."

Jennings, *supra*, 383 F3d at 1211.

Commentators have also noted some circuits excessive reactions to Olech:

> "The U.S. Supreme Court's opinion in Olech was short and apparently rather simple, but some of the federal courts of appeal treated it like a complex puzzle, to be mined for hidden meaning. Almost immediately after it was reported, both the Seventh and Second Circuits engaged in what they must

> have viewed as damage control, that is, an attempt to limit Olech so that it would not overrun the federal courts with garden variety disputes involving claims against local government."

Farrell, Robert C., *Classes, Persons, Equal Protection, and Village of Willowbrook v Olech*, 78 Wash L Rev 367, 403 (2003).

There is evidence that the circuits are "carefully circumscribing" the Olech legal theory to address these concerns. There are at least three methods of circumscribing Olech claims in use in the lower courts, all less damaging to individual rights than the Ninth Circuit's approach: 1) requiring that a plaintiff prove illegitimate animus as an element of an Olech claim; 2) requiring proof of a specific intent to discriminate or 3) establishing a strict standard for pleading or proving when employees treated differently are similarly situated. See, Farrell, Robert C., *supra*, 78 Wash L R at 403.

While the Ninth Circuit gave no explanation why other methods of circumscribing Olech are inadequate to address concerns in the public employment context, the significant disagreement over these methods in other courts may explain the Ninth Circuit's failure to consider them. Thus, some circuits require plaintiffs to establish illegitimate animus to state an Olech claim. Shipp v McMahon, 234 F3d 907, 916 (5th Cir 2000); Boone v Spurgess, 385 F3d 923, 932 (6th Cir 2004). Other circuits require proof of illegitimate animus *plus* different treatment of others similarly situated. Bartell v

Aurora Public Schools, 263 F3d 1143, 1149 (10th Cir 2001); Jennings v Stillwater, 383 F3d 1199, 1211, 1213 (10th Cir 2004). Some circuits permit an Olech claim based upon proof of *either* illegitimate animus or different treatment of others similarly situated. Squaw Valley Dev Co v Goldberg, 375 F3d 936, 944 (9th Cir 2004). At least one circuit has contradictory lines of cases (See, Racine Charter One, Inc, v Racine Unified School District, 424 F3d 677, 683-84 (7th Cir 2005)) with the most recent decisions recognizing two types of Olech claims - one based upon proof of illegitimate animus (the "animus" test) and a second based upon proof of different treatment with no rational basis for the difference ("the rational basis" test). Lauth v McCollum, 424 F3d 631, 634 (7th Cir 2005). Yet another circuit holds an Olech claim is not dependent upon proof of a bad motive but rather requires proof of different treatment of similarly situated employees with no rational basis for the different treatment. Cobb v Pozzi, 352 F3d 79, 99 (2nd Cir 1003).

Some courts impose high standards for pleading or proving when a plaintiff is similarly situated with others treated differently. Campagna v Mass. Dept. of Envt'l, 334 F3d 150, 156 (1st Cir 2003)(affirming dismissal of complaint due to lack of specific allegations identifying similarly situated comparators in complaint); Neilson v D'Angelis, 409 F3d 100, 105 (2nd Cir 2005) (holding plaintiff's proof must identify comparators "*prima facie* identical" who were treated differently to succeed on a 'class of one' claim). Other circuits require only general allegations of different treatment or vindictive conduct to take their case in front of a jury.

Levenstein v Salafsky, 164 F3d 345, 352 (7th Cir 1998)(holding allegation of vindictive conduct without identification of comparators treated differently sufficient to survive motion to dismiss); DeMuria v Hawkes, 328 F2d 704,707 (2d Cir 2003)(holding Olech does not require a plaintiff to plead actual instances where others have been treated differently; rather, general allegations of different treatment and impermissible motive are enough); Cobb v Pozzi, 352 F2d 79, 100 (2nd Cir 2003)(holding question of whether defendants had a rational basis for treating employees differently was a question for the jury).

Some courts require proof of a specific intent to treat an individual differently as distinguished from different treatment resulting from negligence or an error in judgment. Batra v Board of Regents of University of Nebraska, 79 F3d 717, 721 (8th Cir 1996)(holding alleged different treatment of university professors which was consistent with random governmental incompetence insufficient to establish equal protection claim absent proof of purposeful discrimination); Giordano v City of New York, 274 F3d 740 (2d Cir 2001)(different treatment of two police officers using blood thinner Coumadin insufficient to establish equal protection claim absent evidence that individual terminating plaintiff knew of treatment of other police officer).

The disarray among the Circuits is exemplified by Judge Posner's[1] plea for guidance in

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[1]Judge Posner authored the Seventh Circuit's opinions in Esmail v Macrone, 53 F3d 176, 180 (7th Cir 1995)(finding

his concurring opinion in Bell v Duperrault, 367 F3d 703 (7th Cir 2004) where he wrote,

> "May the Court enlighten us; the fact that post-Olech cases are all over the map suggests a need for the Court to step in and clarify its 'cryptic' (citation omitted) *per curiam* decision."

Bell, *supra*, 367 F3d at 711.

### B. This Case Is Uniquely Situated For This Court's Review

Engquist's case is uniquely situated to address the widespread and multiple court divisions over Olech. The majority described Ms. Engquist's case as "unique" because, as the majority noted, "although courts have recognized class-of-one employment claims, they have almost always ultimately concluded that the particular claim before them was insufficient. Engquist, *supra*, 478 F3d at 993-94. In contrast, none of the panel members below suggested that Engquist failed to proffer sufficient evidence to establish an equal protection violation. *Id* at 1014 n. 3.

There is no dispute that the jury made the findings necessary to establish a claim for relief

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equal protection violation based upon "a spiteful effort to 'get' [a person] for reasons wholly unrelated to any legitimate state objection in denial of liquor license.") and Olech v Willowbrook, 160 F 3d 386, 387 (7th Cir 1998)( finding complaint stated a claim for relief due to allegation that plaintiff's prior lawsuit against defendant generated "substantial ill will.")

under Olech. In addition to instructing the jury on the elements this Court held in Olech stated a claim for relief, the trial judge required the jury to sign a special interrogatory finding each of those elements. The special interrogatory, which the jury answered with a "yes" answer, asked:

> "Did the individual defendants intentionally treat the plaintiff differently than others similarly situated with respect to the denial of her promotion, the termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons."

App- 3-4.

By requiring the jury to find (1) intentional different treatment from others similarly situated; (2) with respect to an adverse action; (3) no rational basis for the different treatment; and (4) the different treatment was solely for arbitrary, vindictive or malicious reasons, the trial judge required petitioner to meet the standards used in any circuit's test for an Olech claim.

There is also no dispute petitioner's evidence was sufficient to meet any requirement for illegitimate animus. The proof of illegitimate animus was substantial enough defendants conceded in the Ninth Circuit plaintiff's trial theory focused on proving an "insidious plan to get rid of" plaintiff and conceded the jury could have found such a plan was

proven. Appellants Opening Brief at 16. Petitioner's claimed constitutional deprivation is not one based upon negligence or errors in judgment.

Third, Engquist's case is also uniquely situated because of what is not contested. On appeal, defendants did not challenge the court's jury instructions nor the sufficiency of the evidence to prove (1) there was "no rational basis" for their actions toward petitioner; (2) their actions toward petitioner were arbitrary, malicious or vindictive; or (3) their actions caused the denial of promotion, the loss of bumping rights or petitioner's termination.

Thus, both Olech's application in the public employment context and the test for establishing an Olech claim are squarely presented for this Court's review.

### C. The Ninth Circuit's Reasoning In This Case Is Poor Constitutional Policy That Undermines This Court's Prior Decisions

In its decision to abrogate Olech in the public employment context, the panel majority below drew a distinction between the government acting as proprietor and the government acting as lawmaker, regulator, or licensor. In support, the majority noted that just last year in Garcetti v. Ceballos, __ U.S. __, 126 S.Ct. 1951, 1960, 164 L.Ed.2d 689 (2006), this Court agreed that courts review restrictions on employee speech with greater deference to the government than in a law-making or regulatory context. *See also* O'Connor v. Ortega, 480 U.S. 709,

721-22, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (O'Connor, J., plurality opinion) (holding that the government, as employer, need not obtain a warrant to search an employee's property).

Unlike in the First and Fourth Amendment contexts, however, this Court has never limited the Fourteenth Amendment's scope as applied to public employment. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *see also* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728-29, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (applying gender-based equal protection case law from outside the employment context to public employees).

And even in the First and Fourth Amendment contexts, government employees do not give up their right to be free from hostile, arbitrary, and malicious treatment by their employer. Garcetti, __ U.S. at __, 126 S.Ct. at 1958 ("public employees do not surrender all of their First Amendment rights by reason of their employment."); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. at 664, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) ("Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer."). Because every governmental action must be supported by a rational basis, Cleburne, 473 U.S. at 448-49, 105 S.Ct. 3249, an employee's equal protections rights are violated when she is "intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment." Olech, 528

U.S. at 564.

This Court's prior decisions also show that excluding an area of state decision-making from the application of the Equal Protection Clause is poor constitutional policy. In Olech, the Solicitor General and the defendant argued against application of the Equal Protection Clause in Olech because of the potential for transforming ordinary zoning decisions into constitutional violations. Yet, no member of this Court advocated the exclusion of zoning disputes from the reach of the Equal Protection Clause. See, Village of Willowbrook v Olech, 528 US 562, 566, 120 S Ct 1073, 145 L Ed 2d 1060 (2000)(Justice Breyer concurring).

This view is supported by the Olech Court's reliance upon two cases applying traditional equal protection analysis to individual tax decisions. Sioux City Bridge Co v Dakota County, 260 US 441, 67 L Ed 340, 43 S Ct 190 (1923) and Allegheny Pittsburgh Coal Co., v Commission of Webster Cty, 488 US 36,109 S Ct 633,102 L Ed 2d 688 (1989). Both cases dealt with a plaintiff's claims their real properties were intentionally taxed at full value while other properties of the same class were taxed below true value. Both plaintiffs claimed the intentional different treatment of their property for tax purposes violated equal protection rights. Sioux City Bridge Co., *supra*, 260 US at 442-443.

In those cases, similar to the discretion of the state when managing its own affairs, the Court recognized the ".. States.. broad powers to impose and collect taxes." Allegheny Pittsburgh Coal Co.,

*supra*, 488 US at 344. Nevertheless, rather than excluding individual tax decisions from application of the Equal Protection Clause, the Court focused federal review on the meaning of discrimination in a constitutional sense by,

> "...inviting attention to the well-established rule in the decisions of this court, cited above, that mere errors in judgment do not support a claim of discrimination, but that there must be something more-something which in effect amounts to an intentional violation of the essential principle of practical uniformity..."

Sioux City Bridge Co., *supra*, 260 US at 447.

If application of Olech would be disruptive, displace established rules, or create a flood of federal cases in the public employment arena, the potential disruptive effect could be no greater than applying Olech to individual tax decisions. If as noted in Jennings, Olech creates the potential for federal review of every state actors' executive and administrative decision, why shouldn't all executive and administrative decisions be exempt from equal protection rational basis review?

Rather than narrowing equal protection's coverage, this Court's decisions affirm the broad application of the Equal Protection Clause:

> "[t]he purpose of the equal protection clause of the Fourteenth Amendment is

> to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

Village of Willowbrook, *supra*, 528 US at 566, *quoting from*, Sioux City Bridge Co., *supra*, 260 at 445.

Ms. Engquist's claims that two agents of the State of Oregon intentionally and arbitrarily discriminated against her through the improper execution of their authority, fits squarely within the scope of Olech, Sioux City Bridge Co. and Allegheny Pittsburg Coal Co.

### D. The Ninth Circuit's Decision Harms State And Municipal Employees

Finally, the Ninth Circuit's decision in this case harms state and municipal employees. While the majority panel specifically held the "class of one" equal protection theory does not apply to public employment decisions, there is no principled way to distinguish the class of one legal theory from any other rational basis public employment equal protection claim. Courts currently apply traditional rational basis analysis to equal protection claims based upon disability, homosexuality and age. Gill v City of New York, 2003 WL 941607 (S.D.N.Y. 2003)(denying summary judgment on equal protection claim that police officer with seizure disorder was treated differently than others similarly

situated); Yates v Beck, 2003 WL 22231260 (W.D.N.C. 2003) (applying rational basis review to claim of disability discrimination); Pruitt v Cheney, 963 F2d 1160, 1166 (9th Cir 1992)(applying rational basis review to claim of discrimination against lesbian chaplain); Emblen v Port Auth. Of New York, 2002 WL 498634 (S.D.N.Y. 2002)(applying rational basis equal protection analysis to claim that police officer was harassed because of false perception of homosexuality); Glover v Williamsburg Local School Distr., 20 F Supp 2d 1160 (S.D. Ohio 1998) (nonrenewal of tenured teacher because of sexual orientation violates Equal Protection Clause); Miguel v Guess, 51 P3d 89 (Wash. App. Div. 200) (public employee's allegation she was terminated because of sexual orientation states an equal protection claim); Massachusetts Board of Retirement v Murgia, 427 US 307, 96 S Ct 2562, 29 L Ed 2d 520 (1976)(holding rational basis review applied to equal protection challenge to statute setting mandatory retirement age for police officers).

Does the unavailability of the class of one legal theory mean that the Ninth Circuit will not review any rational basis equal protection claim challenging individual public employment decisions? If the Ninth Circuit will not conduct rational basis review of public employment decisions, are individual employment decisions subject to 'strict scrutiny' and 'heightened scrutiny' still subject to Ninth Circuit review?

In sum, immediate intervention is necessary to settle this important and fatally fractured area of the law, and to vindicate this Court's Equal

Protection jurisprudence in an area of the law where more than 2.7 million federal and more than 16 million state and local government employees are affected[2].

## 2. THIS COURT SHOULD RESOLVE THE SPLIT WITHIN THE STATE COURTS AS TO WHETHER "SPLIT RECOVERY" PUNITIVE DAMAGES STATUTES ARE CONSTITUTIONAL

This Court should also accept review of a second issue of national importance presented in this case: whether a state's 'split recovery' punitive damages statute is constitutional. Applying Oregon Revised Statutes § 31.735, a so-called "split-recovery" statute, the District Court entered judgment in favor of the Oregon Department of Justice and against the individual Defendants in an amount equal to sixty percent of the punitive damages the jury awarded on the state tort claim, and it took that money away from Engquist.

Or. Rev. Stat. § 31.735 divides the proceeds of a punitive damage award between plaintiffs and the State of Oregon. The Oregon statute was enacted into law as a part of a Tort Reform package in 1987 over concerns that punitive damages awards may be driving up insurance costs and concerns that Oregon had no statutory provision for reducing excessive punitive damage awards. Graham, Kathy T., *1987 Oregon Tort Reform Legislation: True Reform or Mere*

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[2] http://ftp2.census.gov/govs/apes/06fedfun/pdf (federal), and http://ftp2.census.gov/govs/apes/06stlus.txt (state and local).

*Restatement*, 24 Will L Rev 283, 301 (1988).

As the Ninth Circuit panel noted, Engquist, *supra*, 478 F3d at 1004-05, the state courts are sharply divided over whether "split recovery" statutes pass constitutional muster. The supreme courts in six states have upheld the statutes against federal takings challenges[3]. Cheatham v Pohle, 789 NE 2d 467, 474-475 (Ind. 2003); Evans v State, 56 P3d 1046, 1058 (Alaska 2002); Mack Trucks, Inc., v Conkle, 263 Ga 539, 436 SE 2d 635, 639 (1993); Gordon v State, 608 So 2d 800, 801-802 (Fla. 1992)(per curiam); Shepherd Components, Inc. v Brice Petrides-Donohue & Associates, 473 NW 2d 612, 619 (Iowa 1991). But two state supreme courts have held the statutes violate the federal Takings Clause. Kirk v Denver Publishing Co., 818 P2d 262, 273 (Colo 1991); Smith v Price Development Co., 125 P3d 945 (Utah 2005). One U.S. District Court has held that a split recovery statute violates the Excessive Fines Clause. McBride v Gen. Motors, Corp., 737 F Supp 1563, 1578 (MD Ga. 1990).

Oregon's split recovery punitive damages statute provides in pertinent part:

> "Upon entry of a verdict including an award of punitive damages, the Department of Justice shall become a creditor as to the punitive damages

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[3]The Oregon Supreme Court has upheld the split-recovery statute but decided the question only under the state Constitution. DeMendoza v Huffman, 334 Or 425, 51 P3d 1232, 1245-46 (2002).

> portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows: [forty percent of the punitive damages award to the prevailing party with attorney fees of no more than twenty percent paid out of this amount and sixty percent to the compensation account]."

Or. Rev. Stat. § 31.735

The Ninth Circuit properly recognized that if petitioner's interest in the punitive damage award is "property," then it is a taking for the government "to confiscate 60 percent of it." Engquist, *supra*, 478 F3d at 1001 n. 18. The court went awry - and furthered the jurisdictional conflict - by holding that petitioner's legal interest in the punitive damages award is not property.

Nevertheless, the Ninth Circuit reasoned since punitive damages are not awarded as a matter of right and are an expression of a jury's discretionary moral judgment, a plaintiff's interest in receipt of any specific amount of punitive damages is too speculative to constitute property under the Takings Clause. Engquist, *supra*, 478 F3d at 1004. The Ninth Circuit erred by focusing on the certainty of an award of punitive damages rather than focusing on whether plaintiff's legal interest in the punitive damages award are a form of property cognizable under the Takings Clause.

This Court has not adopted a single, clear test for what constitutes property protected under the Takings Clause. In Phillips v Washington Legal Foundation, 524 US 156, 118 S Ct 1925, 141 L Ed 2d 174 (1998), this Court concluded that the interest gained from the State of Texas' Interest on Lawyers' Trust Account (IOLTA) involved property for Takings purposes. The Phillips Court held that "regardless of whether the owner of the principal [in the account] has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that does *accrue* attaches as a property right incident to the ownership of the underlying principal. Phillips, *supra,* 524 US at 168. The Court relied upon the common law rule that "interest follows principal" as the basis for finding a property interest in Phillips. Phillips, *supra* 524 US at 165. See also, Webb's Fabulous Pharmacies, Inc., v Beckwith, 449 US 155, 164, 101 S Ct 446, 66 L Ed 2d 358 (1980)(holding "earnings of a fund are incidents of ownership of the fund and are property just as the fund itself is property,").

Here, Engquist maintains a property interest in her underlying tort cause of action cognizable under the constitution. Logan v Zimmerman Brush Co., 455 US 422, 102 S Ct 1148, 71 L Ed 2d 265 (1982)(holding law settled that cause of action is species of property protected by due process clause) Mullane v Central Hanover Trust Co., 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 (1949)(holding beneficiaries' legal right to have trustee answer for negligent impairment of, or fruitless diminution of, interest in trust corpus is property for purposes of due process clause).

At common law, Engquist's legal interest in the punitive damages award is incident to her cause of action for intentional interference with contract. Wampler v Palmerton, 250 Or 65, 439 P2d 601 (1968). Petitioner's common law cause of action is defined as "...an aggregate of operative facts giving rise to a right or rights termed 'right' or 'rights of action' which will be enforced by the courts." Dean v Exotic Veneers, Inc., 271 Or 188, 193, 531 P2d 266 (1975). Her common law right of action is a "right to bring suit in a case" that arises "from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant." East Side Mill & Lumber Co., v Southeast Portland Lumber Co., 155 Or 367, 374, 65 P2d 625 (1937). Before petitioner could seek seek punitive damages, she was required to establish all elements of the underlying tort including damages. A claim for punitive damages alone does not constitute a cognizable cause of action. Martin v Cambas, 134 Or 257, 262, 293 P 601 (1930).

Accordingly, regardless of whether Engquist had a constitutionally cognizable interest in the *anticipated* generation of punitive damages (the Ninth Circuit said "no"), any such damages that the jury *actually* awarded immediately attached as a property right incident to Engquist's ownership of the underlying cause of action. Indeed, this Court in Phillips recognized that even if IOLTA interest income had no economically realizable value in the abstract, "possession, control and disposition are nonetheless valuable rights that inhere in the property," Phillips, *supra*, 524 U.S. at 170, 118 S.Ct.

1925, a principle that applies equally to Engquist's interest in the punitive damages award.

While petitioner's legal interest in the punitive damages award is incident to her ownership of the common law right of action, the State has no legal interest in the common law cause of action and thus also the punitive damages. Under state law Oregon has no role in initiating or prosecuting claims for punitive damages. Tenold v Weyerhaeuser Co., 127 Or App 511, 529, 873 P2d 413 (1994); Axen v American Home Products Corp., 160 Or App 19, 23, 981 P2d 340 (1999). Rather, the State's interest is characterized as a contingent right which arises only when there is a fund of money to distribute:

> "The state ... had no interest in, or knowledge of, the case beyond its entirely contingent right under ORS 18.540[4] to a portion of whatever punitive damages might eventually be distributed. Because the state's right under ORS 18.540 is triggered only when a fund capable of distribution exists, the state may not interfere in the actual prosecution of the action."

Eulrich v Snap-On Tools Corp., 103 Or App 610, 798 P 2d 715, 717 (1990).

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[4]Or. Rev. Stat. § 18.540 was the original split recovery statute enacted in 1987. The statute was re-numbered Or. Rev. Stat. § 31.735 in 2003. Other than increasing the State's share of the punitive damages award, the substance of the two statutes is the same.

Since petitioner, not the State, is the owner of the common law cause of action and since the punitive damages award is incident to the common law cause of action, the "State, by *ipse dixit*, may not transform private property into public property without compensation" simply by legislatively abrogating traditional common law rules. Webb's Fabulous Pharmacies, Inc., *supra*, 449 US at 164.

This Court's recent punitive damages jurisprudence in the procedural due process context, directly connecting the amount of punitive damages to harm to only the plaintiff, strengthens the tie between Engquist's claims for compensation on the one hand, and the punitive damages on the other. In Philip Morris v Williams, 549 US ____, 166 L Ed 2d 940 (2007), this Court held that the "amount" of punitive awards must be based solely upon actual or potential harm to the plaintiff. Philip Morris, *supra*, 166 L Ed 2d at 948. In fact, "...the Constitution's Due Process Clause *forbids* a State to use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." Philip Morris, *supra*, 166 L Ed 2d at 948. This Court has mandated that lower courts assure that punitive damages awards are not grossly excessive based in part upon a mathematical comparison of the amount of punitive damages with the actual or potential harm to the plaintiff. BMW of North America, Inc., v Gore, 517 US 559, 575, 116 S Ct 1589, 134 L Ed 2d 809 (1996).

Rather than analyzing petitioner's (and the State's) legal interests in the punitive damages award, the Ninth Circuit focused its analysis on the likelihood a plaintiff will recover on a punitive damages claim:

> "..., punitive damages are 'never awarded as of right, ...Because of the inherently uncertain nature of punitive damages, which are a 'discretionary moral judgment by the jury...a plaintiff's interest in receipt of any certain amount of punitive damages is too speculative to constitute property under the Takings Clause."

Engquist, *supra*, 478 F3d at 1003.

Yet, the Ninth Circuit's reasoning simply shows why petitioner, not the State, is entitled to the punitive damages award or to just compensation. If a punitive damages claim is such a highly speculative investment than the benefit of whatever amount is awarded should go to the owner of the claim that assumes expense and risk of establishing the claim, not to an uninvolved third-party. Petitioner submitted evidence into the trial court record she incurred expenses of $37,000 and her attorney invested $162,000 of attorney time to prosecute the claim for punitive damages. Because she owned the claim and invested money to prosecute the case, she legitimately expects just compensation for the taking of the results of her investment.

In contrast, the State of Oregon invested nothing in establishing petitioner's claim. Since the case was tried in federal court, the State neither provided the forum nor the jury for the proceeding. In any event, since the State had no legal interest in the cause of action, even if it wished to, the State could not prosecute the claim.

Finally, what is most disturbing about the State of Oregon's position is the way the "split recovery" statute distorts the civil litigation process. Attorneys from the Oregon Department of Justice defended the individual defendants and opposed plaintiff's punitive damages claim through trial. After trial, the individual defendants' attorneys proposed entry of judgment in favor of their employer, the Oregon Department of Justice, against their own clients, the individual defendants. Subsequently, defendants attorneys appealed the judgment on all claims except for those under which the Oregon Department of Justice claimed judgment against the individual defendants.

This scenario certainly gives an appearance the State's financial interest in punitive damages conflicts with the individual defendants interest in avoiding a judgment entered against them.

This Court should grant the Petition and hold the "split recovery" punitive damages statutes unconstitutional for violating the Takings Clause.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

2

Supreme Court, U.S.
FILED

No. 07-474 OCT 5 - 2007

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

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ANUP ENGQUIST,

*Petitioner*

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents*

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On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 1

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NOV 24 2004
Trial Division, Dept. Of Justice
Salem, Oregon

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

ANUP ENGQUIST, Case No. 02-1637-A5

Plaintiff, VERDICT

v.

OREGON DEPARTMENT OF AGRICULTURE, JOHN SZCZEPANSKI, and JOSEPH (JEFF) HYATT,

Defendants.

WE, THE JURY, all eight of us concurring, do hereby render our verdict as follows:

1(a). Did the Oregon Department of Agriculture or John Szczepanski or Jeff Hyatt discriminate against plaintiff because of race, color, gender or national origin by causing the loss of promotion, loss of bumping rights or causing the termination of her employment?

___Yes
_X_No

If your answer to this question is "no," do not answer any further questions on this claim and proceed to Question 2. If your answer to Question No. 1(a) is "yes," proceed to Question No. 1(b).

1(b). What damage, if any, did this cause to plaintiff?

Economic: $_____
Non-economic: $ _____

If you awarded damages on this claim *and* on any other claim, indicate whether any of the damages awarded on this claim are unique to this claim:

Economic damages unique to this claim: $____
Non-economic damages unique to this claim: $___

If your answer to this question is yes, which of the individual defendants, if any, are liable to the plaintiff on this claim? *Check the defendant(s) you find liable to the plaintiff.*

[ ] Oregon Department of Agriculture [ ] John Szczepanski [ ] Joseph (Jeff) Hyatt .

If your answer to this question is yes, is the plaintiff entitled to punitive damages against any of the following defendants? *If so, fill in an amount, otherwise leave amount(s) blank*:

Punitive Damages: John Szczepanksi $_____
Joseph (Jeff) Hyatt $_____

Proceed to Question 2.

2(a). Did the Oregon Department of Agriculture subject the plaintiff to retaliation by causing the loss of promotion, the loss of bumping rights or causing the termination of her employment because of her opposition to unlawful employment practices?

___ Yes
_X_ No

If the answer to Question No. 2(a) is "no," do not answer any further questions on this claim and proceed to Question No.3. If the answer to Question No. 2(a) is "yes," proceed to Question No. 2(b).

2(b). What damage, if any, did this cause to the plaintiff?

Economic: $ _____
Non-economic: $ _____

If you awarded damages on this claim *and* on any other claim, indicate whether any of the damages awarded on this claim are unique to this claim:

Economic damages unique to this claim: $ ___
Non-economic damages unique to this claim: $ ___

Proceed to Question 3.

3(a). Did the individual defendants intentionally treat the plaintiff differently than others similarly situated with respect to the denial of

her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons?

_X__ Yes
____ No

If your answer to Question No. 3(a) is "no" do not answer any more questions on this claim and proceed to Question No.4. If your answer to Question No. 3(a) is"yes," proceed to Question No.3(b).

3(b). What damage, if any, did this cause to the plaintiff?

Economic: $ 150,000
Non-economic:$ 25,000

If you awarded damages on this claim *and* on any other claim, indicate whether any of the indicate whether any of the damages awarded on this claim are unique to this claim:

Economic damages unique to :this claim: $ _____
Non-economic damages unique to this claim: $____

If your answer to this question is yes, which of the individual defendants are liable to the plaintiff on this claim? *Check the defendant(s) you find liable to the plaintiff.*

[ X] John Szczepanski [X] Joseph (Jeff) Hyatt

If your answer to this question is yes, is the

plaintiff entitled to punitive damages against any of the following defendants? *If so, fill in an amount, otherwise leave amount(s) blank:*

Punitive Damages: John Szczepanksi $50000
Joseph (Jeff) Hyatt $75000

Proceed to Question 4.

4(a). Did the individual defendants subject plaintiff to arbitrary and unreasonable government actions causing plaintiff to be unable to pursue her profession?

_X__ Yes
____ No

If your answer to Question No. 4(a) is "no" do not answer any more questions on this claim and proceed to Question No.5. If your answer to Question No. 4(a) is "yes," proceed to Question No.4(b).

4(b). What damage, if any, did this cause to the plaintiff?

Economic: $ 10,000
Non-economic: $ 25,000

If you awarded damages on this claim *and* on any other claim, indicate whether any of the damages awarded on this claim are unique to this claim:

Economic damages unique to this claim: $ ___
Non-economic damages unique to this claim: $ ___

If your answer to this question is yes, which of the individual defendants are liable to the plaintiff on this claim? *Check the defendant(s) you find liable to the plaintiff.*

[X] John Szczepanski [ ] Joseph (Jeff) Hyatt

If your answer to this question is yes, is the plaintiff entitled to punitive damages against any of the following defendants? *If so, fill in an amount, otherwise leave amount(s) blank:*

Punitive Damages: John Szczepanksi $ _____
Joseph (Jeff) Hyatt $ _____

Proceed to Question 5.

5(a). Did the individual defendants intentionally interfere with the plaintiff's employment relationship through improper means or for an improper purpose by causing the loss of promotion, the loss of bumping rights or causing the termination of employment?

_X_ Yes
___ No

If your answer to this question is "no," please sign the Verdict Form. If your answer to this question is "yes," proceed to question 5(b).

5(b). What damage, if any, did this cause to the plaintiff?

Economic: $ 35000

Non-economic: $ _____

If you awarded damages on this claim *and* on any other claim, indicate whether any of the damages awarded on this claim are unique to this claim:

Economic damages unique to this clam: $___
Non-economic damages unique to this claim: $ ___

If your answer to this question is yes, which of the individual defendants are liable to the plaintiff on this claim? *Check the defendant(s) you find liable to the plaintiff.*

[X] John Szczepanski [X] Joseph (Jeff) Hyatt

If your answer to this question is yes, is the plaintiff entitled to punitive damages against any ofthe following defendants? *If so, fill in an amount, otherwise leave amount(s) blank:*

Punitive Damages: John Szczepanksi $ 50,000
Joseph (Jeff) Hyatt $ 75,000

The Presiding Juror should sign and date this Verdict Form.

S/_____

DATED this 18th day of November, 2004.

s/_____
PRESIDING JUROR

FILED' 5 FEB 04 10:07 USDC-ORP
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANUP ENGQUIST, *Case* No. 02-1637-AS

Plaintiff,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOHN SZCZEPANSKI, and JOSEPH (JEFF) HYATT,

Defendants.

Plaintiff's claims were tried before a jury on November 1, 2004 through November 18, 2004. On November 18, 2004, the jury rendered its verdict on plaintiffs claims a copy of which is attached *as* Exhibit A to this Judgment,

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Plaintiff Anup Engquist is entitled to judgment in the amount of $150,000 in economic and $25,000 in non-economic damages against John Szczepanski and Joseph (Jeff) Hyatt on the claim for deprivation of rights under the Equal Protection Clause of the United States Constitution based upon different treatment of similarly situated employees without any rational basis and solely for arbitrary, vindictive or malicious reasons. Plaintiff Anup Engquist is further entitled to $10,000 in economic and $25,000 in non-economic damages against John

Sczcepanski and Joseph (Jeff) Hyatt on the claim for deprivation of substantive Due Process rights under the United States Constitution based upon arbitrary and unreasonable government actions causing plaintiff to be unable to pursue her profession, which amount is merged into the larger sums awarded for deprivation of rights under the Equal Protection Clause, and Plaintiff Anup Engquist is further entitled to $35,000 in economic damages against John Sczcepanski and Joseph (Jeft) Hyatt on the claim for intentional interference with employment relations for an improper purpose or using improper means, which amount is merged into the larger sums awarded for deprivation of rights under the Equal Protection Clause.

2. Plaintiff Anup Engquist is entitled to judgment in the amount of $70,000 in punitive damages against John Szczepanski, $50,000 of which is attributable to the claims for deprivation of rights under the Equal Protection Clause and $20,000 of which is attributable to the claim for intentional interference with employment relations.

3. The Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section is entitled to judgment in the amount of $30,000 in punitive damages against John Szczepanski, which is attributable to plaintiff's recovery of punitive damages on her claim for intentional interference with employment relations based upon ORS 31.735.

4. Plaintiff is entitled to judgment in the amount of $105,000 in punitive damages against

Joseph (Jeft) Hyatt, $75,000 of which is attributable to the claims for deprivation of rights under the Equal Protection Clause and $30,000 of which is attributable to the claim for intentional interference with employment relations.

5. The Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section is entitled to judgment in the amount of $45,000 in punitive damages against Joseph (Jeft) Hyatt, which is attributable to plaintiff's recovery of punitive damages on her claim for intentional interference with employment relations based upon ORS 31.735.

6. The Oregon Department of Agriculture is entitled to judgment dismissing all claims.

7. John Szczepanski and Joseph (Jeft) Hyatt are entitled to judgment dismissing claims for discrimination and retaliation based upon race, color, gender or national origin under the Equal Protection Clause of the U. S. Constitution and 42 U.S.C. § 1981.

8. Anup Engquist is entitled to post-judgment interest on the judgments in paragraphs 1 through 3 above at the rate of 2.47% from the date of judgment.

9. Anup Engquist is the prevailing party against defendants Szczepanski and Hyatt and is entitled to an award of costs and attorney fees against said defendants.

10. The Oregon Department of Agriculture is

the prevailing party against plaintiff and is entitled to an award of costs against plaintiff.

DATED this 4th day of February, 2005.

S/ Donald C. Ashmanskas
DONALD C. ASHMANSKAS
U. S. District Court Judge
Magistrate Judge

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

ANUP ENGQUIST,

*Plaintiff-Appellee,*

v.

OREGON DEPARTMENT OF AGRICULTURE; JOSEPH (JEFF) HYATT; JOHN SZCZEPANSKI,

*Defendants-Appellants.*

No. 05-35170

D.C. No.
CV 02-1637 AS

ANUP ENGQUIST,

*Plaintiff-Appellant,*

OREGON DEPARTME.NT OF AGRICULTURE; JOSEPH (JEFF) HYATT; JOHN SZCZEPANSKI,

Defendants-Appellees.

No. 05-35263

D.C. No.
CV 02-1637 AS

**OPINION**

Appeals from the United States District Court
for the District of Oregon
Donald C. Ashmanskas, Magistrate Judge, Presiding

Argued and Submitted

July 27, 2006—Portland, Oregon

Filed February 8, 2007

Before: Stephen Reinhardt, A. Wallace Tashima, and Susan P. Graber, Circuit Judges.

Opinion by Judge Tashima;
Dissent of Judge Reinhardt

1501

## COUNSEL

Loren W. Collins, Senior Assistant Attorney General, and Julie A. Smith, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, for defendants-appellants and cross-appellees.

Stephen L. Brischetto, Portland, Oregon, for plaintiff-appellee and cross-appellant.

## OPINION

TASHIMA, Circuit Judge:

Plaintiff Anup Engquist ("Engquist") brought suit alleging violations of federal anti-discrimination law, constitutional law, and state tort law against her former employer, the Oregon Department of Agriculture ("ODA") and John Szczepanski ("Szczepanski") and Joseph Hyatt ("Hyatt"). A jury found the individual defendants liable for constitutional violations of equal protection and substantive due process, and for intentional

interference with contract. The jury awarded Engquist $175,000 in compensatory damages and $250,000 in punitive damages. Pursuant to Oregon law, $75,000 of the punitive damages were allocated to Oregon's Criminal Injuries Compensation Account ("State Account"). Szczepanski and Hyatt (collectively "Defendants") appeal, contending that the constitutional claims are invalid as a matter of law. Engquist cross-appeals, contending that a jury verdict from a coworker's similar trial in state court should have been given preclusive effect, or that it should have been admitted into evidence. She also challenges the allocation of $75,000 of the punitive damages awarded to her to the State Account. We have jurisdiction over the appeal and cross-appeal under 28 U.S.C. § 1291. We hold that Engquist's constitutional claims are invalid as a matter of law, and remand the case to the district court to adjust Engquist's damages and attorneys' fees awards in light of that holding. We affirm on Engquist's cross-appeal.

## FACTUAL BACKGROUND

Engquist was hired in 1992 as an international food standards specialist for the Export Service Center ("ESC"), a laboratory in the ODA. She was hired by Norma Corristan ("Corristan"), who was the director of the ODA's Laboratory Services Division ("LSD"), which included the ESC. Engquist's initial responsibility was to develop a database of food regulations for different countries, but she later focused on marketing the ESC's certification services and consulting with clients.

Hyatt had been employed by the ODA since 1990, and worked in the LSD from 1990 to 2000 as a systems analyst. Engquist had repeated difficulties with Hyatt, and complained to Corristan several times that Hyatt excessively monitored her and made false statements about her. Corristan responded to complaints from Engquist and others about Hyatt by meeting with his supervisor, and requiring him to attend diversity and anger management training.

In June 2001, Szczepanski, who was an Assistant Director of the ODA, took over oversight of the ESC, and sought to fill the vacant ESC manager position. During the summer of 2001, Szczepanski told a client that he could not "control" Engquist, and that Engquist and Corristan "would be gotten rid of." In the fall of 2001, Hyatt told a co-worker that he and Szczepanski were working to "get rid of" Corristan and Engquist. Hyatt drafted a plan to reorganize the ESC, and emailed it to Szczepanski, and Szczepanski subsequently implemented it. Engquist and Hyatt both applied for the ESC manager position. Although Engquist had a more extensive educational background and more experience with the customer-service aspects of the position, Hyatt was offered the position effective October 2001. Szczepanski defended that decision by explaining that he chose Hyatt because of Hyatt's business experience and work as a chemist at the ODA.

On October 5, 2001, the Governor announced that the state was experiencing a budget crisis and called for budget reductions. Soon afterwards, Szczepanski eliminated Corristan's position, allegedly because of

the budget crisis. Near the end of 2001, Hyatt told a former ODA employee, then an ESC client, that Corristan and Engquist had run the ESC "into the ground," they were on their way out, and he would take over and put it all back together. On January 31, 2002, Engquist was informed that her position was being eliminated due to the reorganization. Pursuant to her collective bargaining agreement ("CBA"), Engquist was given the opportunity to "bump" into another position. Engquist, however, was found unqualified for the only position at her level, and thus was unable to "bump" into it. Since being laid off, Engquist has applied for approximately 200 jobs, but has not been offered a full-time job. She started her own food consulting business, doing the same type of work she did at the ESC. This business, though, does not pay enough to sustain her, and may be losing money. Defendants' vocational expert testified that there are very few opportunities in Oregon for work in Engquist's fields — microbiology, food technology, and food science. Engquist's vocational expert testified that it was not probable that Engquist would find employment in her occupation.

Prior to Engquist's trial, Corristan successfully filed suit against Defendants in state court, and a jury awarded Corristan $1.1 million in damages. That jury found that Hyatt discriminated against Corristan because of her gender or ethnicity, and that Defendants violated her equal protection and procedural due process rights.

## PROCEDURAL BACKGROUND

In her complaint, Enguist alleged claims under

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), 42 U.S.C. § 1981, equal protection, procedural and substantive due process, and intentional interference with contract. She sought economic, non-economic, and punitive damages, as well as attorneys' fees and costs. Defendants moved for summary judgment on all the claims. The district court granted the motion as to the sexual harassment and procedural due process claims, and denied it with respect to the remaining claims. Defendants made a second motion for summary judgment, specifically challenging Engquist's use of the "class-of-one" theory of equal protection. The court denied the motion, concluding that the claim was viable.

The district court rejected Engquist's request that the court give preclusive effect to the jury finding of discrimination in Corristan's state court lawsuit against Defendants. The district court granted Defendants' motion in limine to exclude from evidence the verdict in Corristan's state court case.

The remaining claims proceeded to an 11-day jury trial. After Engquist rested her case-in-chief, defendants moved for judgment as a matter of law, again challenging the equal protection and substantive due process claims. Defendants also asserted that they were entitled to qualified immunity on the constitutional claims. The district court denied the motions. Defendants renewed their motions after the close of evidence, and the court again denied them. Defendants also objected to the jury instructions on the constitutional claims, arguing that those claims should not have been

submitted to the jury. Those objections were overruled.

The jury concluded that Defendants were liable for violations of equal protection and substantive due process, as well as on the contract interference claim. The jury rejected Engquist's Title VII and § 1981 claims against all Defendants. The jury awarded Engquist $175,000 in compensatory damages, which were not specifically tied to any particular successful claim. The jury awarded Engquist $125,000 in punitive damages on the equal protection claim, and $125,000 in punitive damages on the contract interference claim.

Following the verdict, Defendants filed a motion for judgment notwithstanding the verdict, which the court denied. In addition, Engquist objected to the form of the judgment, presumably because the judgment listed the State of Oregon as a judgment creditor, but the district court overruled her objection. The court entered judgment in favor of Engquist, which consisted of $175,000 in compensatory damages and $175,000 in punitive damages. The court entered judgment in favor of the State Account in the amount of $75,000, or 60 percent of the punitive damages awarded on the state tort claim, pursuant to Or. Rev. Stat. § 31.735. The court also awarded Engquist $172,740 in attorneys' fees, as well as costs. Defendants timely filed a notice of appeal, and Engquist timely filed her notice of cross-appeal.

## STANDARD OF REVIEW

We review *de novo* a district court's denial of a

motion for judgment as a matter of law. *Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 886 (9th Cir. 2002). We also review constitutional claims *de novo*. *Masnauskas v. Gonzales*, 432 F.3d 1067, 1069 (9th Cir. 2005). We review a jury verdict under the substantial evidence standard. *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). "Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

## ANALYSIS

### I. Equal Protection

This case presents several issues of first impression in this circuit, the first of which is whether the class-of-one theory of equal protection is applicable to public employment decisions. The jury concluded that Defendants were liable on the equal protection claim because Defendants "intentionally treat[ed] the plaintiff differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive, or malicious reasons." Defendants contend that Engquist's claim fails as a matter of law, because the class-of-one theory is not applicable to the claims of public employees.

We begin by examining the Supreme Court's articulation of the class-of-one theory and its application by the circuit courts. Ultimately, we hold that the class-of-one theory of equal protection is not applicable to decisions made by public employers.

### *A.* Olech *and the Class of One*

[1] "The Equal Protection Clause ensures that 'all persons similarly situated should be treated alike.' " *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)), *rehearing denied*, 395 F.3d 1062 (9th Cir. 2005). The Supreme Court formally recognized class-of-one equal protection actions in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam). In *Olech*, a municipality conditioned water service for a property on the plaintiff-owner's granting a 33-foot easement, even though it required only a 15-foot easement from every other property owner. *Id.* at 563. In a short, per curiam opinion, the Court allowed the plaintiff to proceed on the class-of-one theory, recognizing claims where a "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564. The Court stated that allegations of irrational and wholly arbitrary treatment, even without allegations of improper subjective motive, were sufficient to state a claim for relief under equal protection analysis. *Id.* at 565.

In a three-paragraph concurrence, Justice Breyer expressed concern that *Olech* would transform ordinary violations of state or local law into constitutional cases. *See id.* at 565-66. He nonetheless concurred in the judgment because the plaintiff had alleged that city officials acted with malice or ill will, which distinguished the claim from run-of-the-mill zoning cases. *Id.* at 566.

**[2]** Based on *Olech*, we have applied the class-of-one theory in the regulatory land-use context to forbid government actions that are arbitrary, irrational, or malicious. *See Squaw Valley*, 375 F.3d at 944-48; *see also Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 955 (9th Cir. 2006) (applying class-of-one theory to city's denial of billboard permits). In *Squaw Valley*, the plaintiffs, who operated a ski resort, claimed that two employees working for the state water quality authority subjected them to selective and over- zealous regulatory oversight. 375 F.3d at 938. We applied rational basis scrutiny to review the acts of the government regulators. *Id.* at 944. We held that acts that are malicious, irrational, or plainly arbitrary do not have a rational basis. *Id.* In addition, we held that in an equal protection claim based on selective enforcement of the law, a plaintiff can show that a defendant's alleged rational basis for his acts is a pretext for an impermissible motive. *Id.*

**[3]** We reversed a grant of summary judgment in favor of defendant Singer because, even though the defendants had set forth a rational basis for their acts, there was evidence that Singer acted out of animosity against the plaintiffs. *Id.* at 946-47. In contrast, we sustained the grant of summary judgment in favor of defendant Goldberg because we found no evidence that Goldberg acted with animosity. *Id.* at 947-48. We have not yet decided, however, whether the class-of-one theory should be extended to public employment decisions.

Other courts of appeals have chosen to apply *Olech*'s class of-one theory to public employment

decisions. *See, e.g., Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006); *Hill v. Borough of Kitztown*, 455 F.3d 225, 239 (3d Cir.. 2006); *Whiting v. Univ. of Miss.*, 451 F.3d 339, 348-50 (5th Cir. 2006); *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005); *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005); *Campagna v. Mass. Dep't of Envtl. Prot.*, 334 F.3d 150, 156 (1st Cir. 2003); *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143, 1148-49 (10th Cir. 2001). Courts, however, have "struggled to define the contours of class-of-one cases" because, unless constrained, the class-of-one theory of equal protection claim could provide a federal cause of action for review of almost every executive or administrative government decision. *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210-11 (10th Cir. 2004).[1] Thus, although courts have recognized class-of-one employment claims, they have almost always ultimately concluded that the particular claim before them was insufficient. *See, e.g., Neilson*, 409 F.3d at 106; *Bartell*, 263 F.3d at 1149. Because of this understandable hesitancy, the Seventh Circuit recently noted that it was "not surprised to have found no 'class of one' cases in

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[1]Following Justice Breyer's lead, some courts have limited class-of-one claims by requiring a showing of malice or animus as an element of the claim, but other courts have refused to do so. *See Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1209-10 (10th Cir. 2006) (recognizing split and collecting cases). Neither party in this case has argued that malice or animus is an element of class- of-one employment claims. We note, however, that such a requirement would be inconsistent with both the Court's opinion in *Olech* and our holding in *Squaw Valley*. *See Olech*, 528 U.S. at 565; *Squaw Valley*, 375 F.3d at 944.

which a public employee has prevailed since the extreme case that kicked off the 'class of one' movement more than two decades ago." *Lauth v. McCollum*, 424 F.3d 631, 633-34 (7th Cir. 2005) (citations omitted) (collecting cases).[2] Engquist's thus-far successful claim on this theory thus presents a unique case.

### *B. Applying the Class-of-One Theory to Public Employment*

Whether to apply the class-of-one theory to decisions of public employers presents a significantly different question than whether to apply it to legislative or regulatory acts of government. In general, there is a distinction between the "government acting 'as a proprietor' that was managing 'its own internal affairs' rather than as a 'lawmaker' that was attempting 'to regulate or license.' " *Singleton v. Cecil*, 176 F.3d 419, 425 (8th Cir. 1999) (en banc) (quoting *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) (alterations omitted)). The Supreme Court has always assumed that "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (O'Connor, J., plurality opinion) (discussing difference in government ability to restrict speech).

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[2]That "extreme case" was "*Ciechon v. Chicago*, 686 F.2d 511 (7th Cir. 1982), where a paramedic was made a scapegoat for conduct that had drawn the wrath of the local media, while her identically situated partner received no disciplinary sanction at all." *Lauth*, 424 F.3d at 634.

[4] Because the government as employer has broader powers than the government as regulator, the scope of judicial review is correspondingly restricted. Accordingly, the Supreme Court has warned that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," and therefore the Constitution cannot be interpreted to require judicial review of every such decision. *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (rejecting due process claim where the plaintiff is fired from public employment for reasons either false or mistaken).

In other areas of constitutional law, the Court has limited the rights of public employees as compared to ordinary citizens. For instance, in the First Amendment context, courts review restrictions on employees' speech with greater deference in order to balance the government employer's legitimate interests in its mission. *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006) (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline"); *City of San Diego v. Roe*, 543 U.S. 77, 80-82 (2004) (per curiam) (applying balancing test drawn from *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Similarly, in the Fourth Amendment context, the government, as employer, need not obtain a warrant to search an employee's property because imposing such a requirement unduly burdens government business and improperly transforms everyday business incidents into

constitutional matters. *O'Connor v. Ortega*, 480 U.S. 709, 721-22 (1987) (O'Connor, J., plurality opinion).

**[5]** The class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens. The paradigmatic class-of-one case should be one in which a public official, for some improper motive, "comes down hard on a hapless private citizen." *Lauth*, 424 F.3d at 633. This was the type of case decided in *Olech* and *Squaw Valley*. In contrast, when a public employee is subjected to unequal treatment at work for arbitrary reasons, the need for federal judicial review under equal protection "is especially thin" given the number of other legal protections that public employees enjoy. *See id.* A judicially-imposed constitutional proscription of arbitrary public employer actions would also upset long-standing personnel practices. Although arbitrary government acts are unreasonable in the legislative or regulatory context, employers have traditionally possessed broad discretionary authority in the employment context. The power of employers to discharge employees for reasons that may appear arbitrary, unless constrained by contract or statute, is well-established under the common law of at-will employment. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 273-74 (1975) (describing common law); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 324 (1972) (same). Applying equal protection to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of public at-will employment. *See Singleton*, 176 F.3d at 428. We decline to effect such a significant change

in employment law under the general provisions of the Fourteenth Amendment. *See Waters*, 511 U.S. at 679 ("[A]n at-will government employee . . . generally has no claim based on the Constitution at all.").[3]

In addition to significantly altering traditional personnel practices, applying the class-of-one theory to public employment would also generate a flood of new cases, requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one. *See Jennings*, 383 F.3d at 1211. The theory would apply not only to discharges, but also to other employment actions, such as promotions, disciplinary actions, and decisions about pay, benefits and transfers. Contrary to the Supreme Court's admonition, federal courts would be required to "review the multitude of personnel decisions that are made daily by public agencies." *Bishop*, 426 U.S. at 349.

**[6]** Finally, we believe that *Olech* is too slender a reed on which to base such a transformation of public employment law. "It seems unlikely that the Supreme Court intended such a dramatic result in its *per curiam* opinion in *Olech*." *Campagna v. Mass. Dep't of Envtl. Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff'd*, 334 F.3d 150 (1st Cir. 2003).

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[3]If an employee is not an at-will employee, then there is already protection against arbitrary firings, such as in civil service regulations or a CBA, which lessens the need for constitutional protection. *See Lauth*, 424 F.3d at 633. In this case, for whatever reason, there is nothing in the record to indicate that Engquist challenged her dismissal under the applicable CBA.

Accordingly, we hold that the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees. We therefore reverse the judgment in favor of Engquist on her equal protection claim.[4]

## II. Substantive Due Process

[7] This case also presents a novel due process issue for this circuit: what showing is required in a substantive due process claim based on the right to pursue a particular profession. The jury concluded that Defendants were liable on the substantive due process claim because they "subject[ed] plaintiff to arbitrary and unreasonable government actions causing plaintiff to be unable to pursue her profession." Defendants contend that, as a matter of law, they cannot be held liable under substantive due process for violating this right. In the alternative, they contend that Engquist did not present sufficient evidence to demonstrate that their actions deprived her of the ability to pursue her profession.[5]

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[4]Because we conclude that Engquist's class-of-one claim is invalid, we need not reach Defendants' contention that they are entitled to qualified immunity under *Saucier v. Katz*, 533 U.S. 194, 201 (2001). *See Squaw Valley*, 375 F.3d at 943.

[5]Engquist contends that Defendants have waived these arguments because the court accepted their proposed jury instructions for the claim. In fact, Defendants challenged the legal validity of the claim repeatedly and proposed jury instructions only in case the court rejected their legal arguments. Therefore, Defendants have not waived these arguments. Engquist also argues that some particular arguments were waived because they were not raised below. Even assuming such waiver, however, we will consider them

We hold that Engquist has stated a valid claim — a claim upon which relief can be granted — under substantive due process by alleging that Defendants' actions prevented her from pursuing her profession. We conclude, however, that Engquist's claim fails as a matter of law because she did not present sufficient evidence that Defendants' actions were responsible for her inability to pursue her profession.

### *A. Nature of the Protected Right*

"The substantive component of the Due Process Clause forbids the government from depriving a person of life, liberty, or property in such a way that . . . interferes with rights implicit in the concept of ordered liberty." *Squaw Valley*, 375 F.3d at 948 (internal quotation marks omitted). "A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). As discussed above, most courts have rejected the claim that substantive due process protects the right to a particular public

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because these arguments are intertwined with the validity of the claim. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."). In addition, where an issue is purely legal, and the other party would not be prejudiced, we can consider an issue not raised below. *See Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). Here the issues are purely legal and were fully briefed by Engquist; therefore, we exercise our discretion to consider these arguments.

employment position, and we have yet to decide the issue. *See Nicholas v. Pa. State Univ.*, 227 F.3d 133, 142-43 (3d Cir. 2000); *Dias*, 436 F.3d at 1131 n.3. Engquist, however, premised her claim on interference with her ability to pursue a profession altogether.

[8] The Supreme Court has not specified the boundaries of the right to pursue a profession, but has identified it generally. *See Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (stating that there is "some generalized due process right to choose one's field of private employment"). The Court has noted, however, that cases recognizing the right "all deal with a complete prohibition of the right to engage in a calling, and not [a] sort of brief interruption." *Id.* at 292. We have recognized the liberty interest in pursuing an occupation of one's choice. *See Dittman v. California*, 191 F.3d 1020, 1029-30 (9th Cir. 1999). We have held that a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by government actions that were arbitrary and lacking a rational basis. *Sagana v. Tenorio*, 384 F.3d 731, 742-43 (9th Cir. 2004), *cert. denied*, 543 U.S. 1149 (2005); *Dittman*, 191 F.3d at 1030; *Wedges/Ledges*, 24 F.3d at 65. *But see Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994) (holding that this occupational liberty is protected only by procedural due process rights, and not substantive due process).

All of our cases recognizing this substantive due process right dealt with government legislation or regulation, and not the acts of a government as an employer, which allegedly prevented the plaintiff

from pursuing a specific profession. *See Sagana*, 384 F.3d at 733, 743 (challenging commonwealth law implementing temporary immigrant labor program); *Dittman*, 191 F.3d at 1029-33 (challenging state law imposing conditions on acupuncture licenses); *Wedges/Ledges*, 24 F.3d at 65-66 (challenging city ordinance that banned new licenses for particular arcade games); *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991) (challenging state regulatory refusal to license a new bank). As discussed above, constitutional review of government employer decisions is more constrained than the review of legislative or regulatory ones. *See* Part I.B, *supra*. Defendants thus argue that there should be no substantive due process review of employment decisions, and there is some support for that proposition. *See Singleton*, 176 F.3d at 428 (holding that in the public employment context, an employee's occupational liberty is not protected by substantive due process, but only by procedural due process).[6]

**[9]** We decline to hold that there is no substantive due process claim for a public employer's violations of occupational liberty. Rather, we limit the claim to

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[6]In support of her claim, Engquist cites several cases that are unhelpful because they involve procedural rather than substantive due process. *See DiMartini v. Ferrin*, 889 F.2d 922, 927-29 (9th Cir. 1989), *as amended by* 906 F.2d 465; *Brady v. Gebbie*, 859 F.2d 1543, 1552-53 (9th Cir. 1988); *Merritt v. Mackey*, 827 F.2d 1368, 1372 (9th Cir. 1987). These cases help establish that the right to pursue a profession is a protected liberty interest, but are unhelpful with respect to substantive due process protection. *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988), may have involved substantive due process, but was based on abusive police conduct, and therefore provides little guidance.

extreme cases, such as a "government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure." *Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997). Such a governmental act would threaten the same right as a legislative action that effectively banned a person from a profession, and thus calls for the same level of constitutional protection. The concerns about federal courts reviewing every public employee discharge, *see Singleton*, 176 F.3d at 428-29, are not implicated because such a claim is colorable only in extreme cases. Nor does such a standard, unlike the class-of-one theory, affect the vast majority of public employer decisions.

**[10]** As we have already recognized that the right to pursue a chosen profession is protected by substantive due process in the legislative context, we believe that the right should also be protected in the public employment context. Therefore, we hold that there is substantive due process protection against government employer actions that foreclose access to a particular profession to the same degree as government regulation.[7]

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[7]Defendants argue that Engquist's substantive due process claim is preempted by her class-of-one equal protection claim because it more specifically addresses her theory of liability. *See Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc) ("Substantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have

### *B. Sufficiency of the Evidence*

Having identified the contours of the substantive due process right, we next turn to the question of whether Engquist's evidence at trial satisfied this standard. Defendants contend that the evidence was insufficient to show that Engquist was deprived of her right to pursue a profession. We agree.

[11] We have not previously articulated how much interference with someone's job prospects constitutes a denial of the right to pursue a profession. On this question, we find useful the Seventh Circuit's standard that in order to bring an occupational liberty claim, a plaintiff must show that the "character and circumstances of a public employer's stigmatizing conduct or statements are such as to have destroyed an employee's freedom to take advantage of other employment opportunities." *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 531 (7th Cir. 2000). "It is not enough that the employer's stigmatizing conduct has some adverse effect on the employee's job prospects; instead, the employee must show that the stigmatizing actions make it virtually impossible for the employee to find new employment in his chosen field." *Id.* (internal quotation marks omitted).

[12] Under this standard, only employer actions

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merit."); *Squaw Valley*, 375 F.3d at 949-50 (holding that substantive due process claims based on government interference with property rights are preempted by the Takings Clause). Because we have held that the class-of-one theory is inapplicable in the employment context, *see* Part I, *supra*, Engquist's due process claim is not preempted.

that affect a plaintiff's occupational prospects to the same degree as government legislation are actionable under a substantive due process theory. Thus, it comports with our cases in the legislative context. *See Dittman*, 191 F.3d at 1029 (holding that a law that imposes a " 'complete prohibition' on entry into a profession . . . implicates a person's liberty interest in pursuing an occupation or profession of her choice"). The standard also ensures that substantive due process protects the right to pursue an entire profession, and not the right to pursue a particular job. Accordingly, we adopt the standard set forth in *Bordelon*.

**[13]** In this case, Engquist presented evidence that Defendants made defamatory statements to two or three other people in the industry. In addition, Engquist presented evidence that she was having much difficulty finding a job in the same field in Oregon, and that such difficulty would likely continue. Engquist, however, did not demonstrate that Defendants' actions caused her job-search difficulties. There was no proof that Defendants' defamatory comments affected opportunities with those clients, or any other possible employer. Even under the substantial evidence standard, *see Gilbrook*, 177 F.3d at 856, there was no evidence that her reputation had been publicly damaged by Defendants such that they reduced her employment options. Instead, it appears that Engquist works in a highly specialized field, and there simply are not many jobs available in that field in Oregon. Because Defendants did not cause this situation, their specific actions have not made it "virtually impossible" for Engquist to find new employment. *See Bordelon*, 233

F.3d at 531. Therefore, we conclude that Engquist did not present sufficient evidence to sustain her substantive due process claim.[8] Consequently, we reverse the judgment in favor of Engquist on her substantive due process claim.[9]

## III. Engquist's Damages and Attorneys' Fees

**[14]** Because we reverse the judgment in favor of Engquist on her constitutional claims, the damages award and attorneys' fees award must be vacated. The compensatory damages may be unaffected because the jury also found in favor of Engquist on the interference with contract tort claim and did not allocate its award of compensatory damages to any particular claim, or between claims. The punitive damages awarded for the equal protection claim, however, cannot stand. Additionally, the district

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[8]Defendants argue that if there is an available substantive due process claim, pretext is not part of the inquiry. In our substantive due process decisions regarding occupational liberty, we did not question whether the government's proffered justification was a pretext. *See, e.g.*, *Wedges/Ledges*, 24 F.3d at 66 ("[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did."). These cases all involved legislation, however, and an inquiry into pretext may be appropriate in the employment context. Regardless, we need not decide the issue as we have held that Engquist has not shown that she was deprived of her right to occupational liberty. *See Dittman*, 191 F.3d at 1029-31 (inquiring into the justification for an action only after holding that the plaintiff was deprived of her liberty interest).

[9]Because we conclude that Engquist's due process claim is invalid, we need not reach Defendants' contention that they are entitled to qualified immunity. *See* footnote 4, *supra*.

court's award of attorneys' fees can no longer be based on 42 U.S.C. § 1988. *See Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1990) (holding that a plaintiff who succeeds on a state claim, but on none of her constitutional claims, is not a "prevailing party" under § 1988).[10] Accordingly, we vacate the awards of damages and attorneys' fees, and remand to the district court to decide how to adjust Engquist's damages and attorneys' fees awards.

## IV. Oregon's Punitive Damages Allocation Statute

Pursuant to Or. Rev. Stat. § 31.735, the district court entered judgment in favor of the State Account in an amount equal to 60 percent of the punitive damages award. The punitive damages award for the federal, *i.e.*, equal protection claim, was not subject to the § 31.735 allocation, but only the punitive damages award for the state law tort claim of contract interference. Engquist's primary contention on crossappeal is that § 31.735 violates the Fifth Amendment's Takings Clause and the Excessive Fines Clause of the Eighth Amendment.[11]

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[10]We express no opinion as to whether Engquist is entitled to attorneys' fees under Oregon law.

[11]As an initial matter, Defendants contend that Engquist's challenges are unripe. We can readily dispense with this argument. "Ripeness analysis has two prongs: the fitness of the issue for judicial review and the hardship to the parties if review is withheld." *Gemtel Corp. v. Cmty. Redev. Agency*, 23 F.3d 1542, 1545 (9th Cir. 1994). A claim is fit for decision if the issues are primarily legal, do not require further factual development, and challenge a final action. *Verizon Cal. Inc. v.*

### *A. Judicial Estoppel*

Engquist's first argument is that the doctrine of judicial estoppel prevents the Oregon Justice Department from collecting funds for the State Account because the Department, as Defendants' counsel, previously denied liability for punitive damages. We review the district court's decision not to invoke judicial estoppel for an abuse of discretion. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

Judicial estoppel prevents a party from taking inconsistent positions when those inconsistencies have an adverse effect on the judicial process. *United States v. Miguel*, 338 F.3d 995, 1002 n.20 (9th Cir. 2003) ("Judicial estoppel prevents a party from taking a contrary position 'where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position.' " (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001))). We reject Engquist's contention that the Department took inconsistent positions. By virtue of its decision to represent Defendants, the Department necessarily held the view that Defendants had not committed "malfeasance in office or willful or wanton neglect of duty." *See* Or. Rev. Stat. § 30.285 (requiring the Department to defend and indemnify state employees, unless it deems that the employees

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*Peevey*, 413 F.3d 1069, 1075 (9th Cir. 2005) (Bea, J., concurring). Engquist's challenges to the constitutionality of § 31.735 easily satisfy both prongs of the ripeness test, as the issues presented are purely legal and delay will cause unnecessary hardship. We thus reject Defendants' contention that the claims are unripe.

committed "malfeasance in office"). The Department's views did not change during the proceedings below; rather, it was the *jury* that concluded that Defendants acted with "malice" or "reckless and outrageous indifference," such that it found punitive damages were appropriate. *See* Or. Rev. Stat. § 31.730.

Nor did the Department take an inconsistent position when it sought judgment creditor status under § 31.735. The Department did not change its position to one of agreement with the jury determination of willfulness or malice but, because the jury awarded punitive damages, the State Account was automatically entitled to its statutory portion and the Department was separately obligated under § 31.735 to obtain judgment creditor status in order to obtain this statutory portion. Accordingly, we conclude that the district court did not abuse its discretion in rejecting Engquist's judicial estoppel argument.[12]

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[12]Engquist's argument that the Department suffered from a conflict of interest is equally without merit. The Department does not have a "proprietary interest" in the State Account because it is not allowed to retain any of the funds for its own benefit or even charge fees to those who apply for funds under the program. *See* Or. Rev. Stat. § 147.315. Nor does the statutory apportionment of a portion of the punitive damages award to the State Account increase the total amount of Defendants' liability; rather, it merely reduces the total amount of Engquist's recovery. Therefore, there was no conflict between the Department's representation of Defendants and its subsequent act of seeking an award under § 31.735. *See Kasza v. Browner*, 133 F.3d 1159, 1171 (9th Cir. 1998) (rejecting a plaintiff's "conclusory charge of institutional 'conflict of interest'" against the Department of Justice's representation of

### *B. Judgment in Favor of a Non-Party*

[15] Engquist next asserts that the district court erred in entering judgment in favor of an entity that was not a party to the proceeding. The Oregon Supreme Court and the district court for the District of Oregon have both held that the State of Oregon can assert its "substantive right as a judgment creditor" pursuant to § 31.735.[13] *See DeMendoza v. Huffman*, 51 P.3d 1232, 1235-36 (Or. 2002); *In re Stein*, 236 B.R. 34, 37 (Bankr. D. Or. 1999). Neither opinion indicates that the State must obtain party status prior to its assertion of this right. The statute's express language, which invites the State to act only "[u]pon the entry of a verdict including an award of punitive damages," belies any inference that the State is required to become a party. Or. Rev. Stat. § 31.735. Additionally, Federal Rule of Civil Procedure 69(a) "permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits." *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 421 (9th Cir. 1998) (internal quotation marks omitted). Under Oregon state procedure, the State can merely be identified as a judgment creditor in the judgment and need not intervene as a party. *See DeMendoza*, 51 P.3d at 1235-36; Or. Rev. Stat. § 31.735(2). Therefore, we

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the defendants, and also questioning whether a plaintiff even has standing to complain about a conflict of interest on the part of the defendants' counsel).

[13]Section 31.735 was formerly known as § 18.540, and was discussed as § 18.540 in the *DeMendoza* opinion, but the substance of the two statutes is the same.

conclude that Oregon is entitled to assert this substantive right without becoming a party.

### *C. Takings Clause Challenge*[14]

Section 31.735, which is called a "split-recovery" provision[15] because it apportions the punitive award between the plaintiff and the State, provides in part:

> Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of

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[14]While Engquist objected to the "form of judgment" in the district court, it is unclear whether she specifically raised any constitutional objections to § 31.735. The district court never specifically ruled on the constitutionality of the statute. Although the State could have argued that Engquist waived the constitutional issues by not raising them below, it did not. Its failure to raise the waiver argument in its brief to this court means that we can reach the merits of the issue. *See United States v. Doe*, 53 F.3d 1081, 1082-83 (9th Cir. 1995) (holding that the government had waived its waiver argument by failing to assert it and instead addressing the merits of the defendant's claim).

[15]*See, e.g.*, Michael J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 Cornell L. Rev. 104 (1994); Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split Recovery Punitive Damages Statute*, 49 Duke L.J. 1335 (2000).

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No. _____

Supreme Court, U.S.
FILED
07-474 OCT 5 - 2007
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

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ANUP ENGQUIST,

*Petitioner*

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents*

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On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 2

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> an award shall be allocated as follows: [forty percent of the punitive damages award to the prevailing party and sixty percent to the compensation account].

Or. Rev. Stat. § 31.735(1).

**[16]** Engquist argues that § 31.735 violates the Takings Clause of the Fifth Amendment, which forbids the taking of "private property . . . for public use, without just compensation." U.S. CONST. AMEND. V.[16] We use a two-step analysis to determine whether a "taking" has occurred: first, we determine whether the subject matter is "property" within the meaning of the Fifth Amendment and, second, we establish whether there has been a taking of that property, for which compensation is due.[17] *Konizeski v. Livermore Labs (In re Consol. U.S. Atmospheric Testing Litig.)*, 820 F.2d 982, 988 (9th Cir. 1987). The dispute in this case focuses on the

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[16]The Takings Clause applies against the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

[17]While there is no formulaic test for the first step, there are multiple approaches to the second step of the analysis. One approach, usually applied to regulatory takings, is the "ad hoc" test enunciated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). As we are focusing on the first step of the takings analysis, we do not engage in analysis of the *Penn Central* factors, even though these factors are discussed by Engquist and several state supreme court decisions. *See, e.g., Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 268 (Colo. 1991); *see also Penn Central*, 438 U.S. at 124 (examining the economic impact of the regulation on the claimant, the "extent to which the regulation has interfered with distinct investment-backed expectations," and the character of the governmental action).

first step, *i.e.*, whether a punitive damages award constitutes property under the Takings Clause.[18]

[17] The question of whether punitive damages awards qualify as property for purposes of the Takings Clause is a question of first impression in the federal courts.[19] Two types of Takings Clause cases guide our analysis: cases examining whether principal owners have a property right in interest that accrues on funds held by the government, and cases examining whether a plaintiff has a property interest in a cause of action. Both of these two species of Takings Clause cases indicate that the relevant inquiry is the certainty of one's expectation in the property interest at issue. They compel us to conclude that Engquist's interest in her punitive damages award is not a property right cognizable under the Takings Clause, because punitive damages awards are necessarily contingent and discretionary. Our conclusion is bolstered by our consideration of the deterrence and punishment justifications for punitive awards, discussed below, and is in concert with the majority of state supreme courts who have

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[18]If the punitive damages award does constitute property, it is a "taking" to confiscate 60 percent of it, such that the second prong almost certainly would be satisfied. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) ("Because interest earned in IOLTA accounts *is the private property* of the owner of the principal, the *transfer* of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto* . . . which was a physical taking subject to *per se* rules." (internal quotation marks and internal citations omitted) (emphasis added)).

[19]Several state supreme courts, however, have decided this issue. *See* Part IV.C.1, *infra*.

decided the question.

### *1. Takings Clause Cases*

Our analysis begins with the Supreme Court cases holding that interest constitutes property for purposes of the Takings Clause. *Webb's*, 449 U.S. 155, involved a state statute that confiscated for the state the interest accrued on interpleader funds. In concluding that the interest was property under the Takings Clause, the *Webb's* Court emphasized that the creditors at issue had "more than a unilateral expectation" in the interest, and cited the "usual and general rule . . . that any interest on an interpleaded and deposited fund follows the principal." *Id.* at 161-62. The Court emphasized that "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. Similarly, in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court concluded that the interest gained from the "Interest on Lawyers' Trust Account" program involved property for Takings Clause purposes. The Court's reasoning hinged on the "fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit." *Id.* at 167.

**[18]** While the interest cases do not articulate a general rule for what is cognizable as property under the Takings Clause, the Court's reasoning focused on the certainty of the principal-holder's expectation of receiving interest. Engquist's expectation that she will receive a punitive damages award or the amount of any such award is far less certain than the

expectation of interest on principal. Simply put, punitive damages do not follow compensatory damages, as interest follows principal. The interest in *Webb's* qualified as property because of the certainty of the creditor's expectations that it would receive interest, pursuant to the general maxim that "interest follows principal." *See Webb's*, 449 U.S. at 162. In contrast, punitive damages are "never awarded as of right, no matter how egregious the defendant's conduct," in contrast to compensatory damages, which "are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss." *Smith v. Wade*, 461 U.S. 30, 52 (1983). Because of the inherently uncertain nature of punitive damages, which are a "discretionary moral judgment" by the jury, *Larez v. City of Los Angeles*, 946 F.2d 630, 648 (9th Cir. 1991) (internal quotation marks omitted), a plaintiff's interest in receipt of any certain amount of punitive damages is too speculative to constitute property under the Takings Clause.

Another category of Takings Clause cases, which examines whether statutory changes to causes of actions can be considered takings, similarly focuses on the certainty of expectations of the person claiming a property interest. We have held that "[t]here is no question that claims for compensation are property interests that cannot be taken for public use without compensation." *Causey v. Pan Am. World Airways, Inc. (In re Aircrash In Bali, Indo. on Apr. 22, 1974)*, 684 F.2d 1301, 1312 (9th Cir. 1982). In that case, however, we did not discuss punitive damages. *Atmospheric Testing Litigation*, 820 F.2d

982, involved a Takings Clause challenge to a statute providing that actions against the United States be the *exclusive* remedy for tort claims against contractors for Hiroshima-related radiation injuries. We relied on the Fifth Circuit's holding that " 'a plaintiff has no vested right in any tort claim for damages under state law.' " *Id.* at 988 (quoting *Ducharme v. Merrill-Nat'l Labs.*, 574 F.2d 1307, 1309 (5th Cir. 1978) (per curiam)). We further emphasized that the claims asserted by the plaintiffs were "contingent by their nature" and "arise in a field in which the law remains to be developed." *Id.* at 989 (also importing the language of *Penn Central*'s "ad hoc" test in noting that tort claims lack "investment-backed expectations"). Because the tort claims were "contingent by their nature," we concluded that the statute's requirement that claims against the federal government be the exclusive remedy did not constitute a taking. *Id.*; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (rejecting a constitutional challenge to a statutory limitation on liability for nuclear accidents, and stating the "clearly established" principle that "[a] person has no property, no vested interest, in any rule of the common law" and that the "Constitution does not forbid . . . the abolition of old [rights] recognized by the common law, to attain a permissible legislative object").

**[19]** The analysis in *Atmospheric Testing Litigation*, like the Supreme Court's interest cases, focused on the certainty of the plaintiff's expectation that she would receive the property. In contrast to the principal-interest cases, the tort plaintiffs in *Atmospheric Testing Litigation* had a necessarily

"contingent" interest in their tort claims, such that the substitution of a different type of remedy did not amount to an unconstitutional taking. As described above, a plaintiff's interest in punitive damages is even more contingent and uncertain than her interest in a tort cause of action, because punitive damages are awarded only if the jury both finds that the defendant's behavior was malicious or reckless *and* decides to invoke its *discretionary* moral judgment against the defendant's conduct. *See Larez*, 946 F.2d at 648 ("the purely discretionary nature of punitive damages required not only a finding that the conduct met the recklessness threshold" but also that the conduct merited punitive damages in addition to the compensatory award, which is a "discretionary moral judgment" (internal quotation marks omitted)); *see also Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1021 (Or. 1990) (" 'The finder of fact must determine what punitive damages, *if any*, to award based on the proper premise of deterring future similar misconduct by the defendant or others.' " (emphasis added) (quoting *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1274 (Or. 1980))). We therefore conclude that a plaintiff's interest in a prospective punitive damages award does not qualify as "property" under the Takings Clause.

### *2. Policy of Punitive Damages Awards*

**[20]** Our conclusion that a plaintiff's interest in receipt of a certain amount of punitive damages is not "property" under the Takings Clause is further supported by consideration of the purposes of punitive damages awards. Punitive damages may be

imposed to serve two policy interests: "punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). A punitive damages award does not serve any compensatory goals. In the words of the Iowa Supreme Court, "a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it." *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 619 (Iowa 1991). As a "fortuitous beneficiary," a tort claimant does not possess an interest cognizable as a property right under the Takings Clause. The Supreme Court has also emphasized that "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore*, 517 U.S. at 568. Given the broad discretion granted to the States in fashioning their punitive damages schemes, we uphold the constitutionality of the Oregon statute against Engquist's Takings Clause challenge.

### *3. State Supreme Court Decisions*

Several state supreme courts have ruled upon the constitutionality of "split-recovery" statutes, with six states (Alaska, Iowa, Indiana, Georgia, Missouri, and Florida) upholding the statutes against federal Takings Clause challenges and two states (Utah and Colorado) holding the statutes unconstitutional. *See* Dodson, *supra*, note 16, 49 Duke L.J. at 1365 n.5 (summarizing state court decisions). The state supreme courts concluded that a plaintiff has no vested right in punitive damages, either (1) because the damages are discretionary and non-

compensatory, or (2) because the statutes operate to limit the awards *before* the time of judgment, that is, before the time when a plaintiff's interest vests. *See, e.g., Cheatham v. Pohle*, 789 N.E.2d 467, 474-75 (Ind. 2003); *Evans v. State*, 56 P.3d 1046, 1058 (Alaska 2002); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 639 (Ga. 1993); *Gordon v. State*, 608 So. 2d 800, 801-02 (Fla. 1992) (per curiam); *Shepherd Components*, 473 N.W.2d at 619; *but see Smith v. Price Dev. Co.*, 125 P.3d 945 (Utah 2005); *Kirk v. Denter Publ'g Co.*, 818 P.2d 262 (Colo. 1991).[20] Our holding that punitive damages are not cognizable as property under the Taking Clause is therefore in accord with the conclusions reached by a majority of state supreme courts who have considered the issue.

### *D. Excessive Fines Clause Challenge*

**[21]** Engquist also contends that § 31.735 violates the Excessive Fines Clause of the Eighth Amendment. That amendment instructs: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

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[20]The Oregon Supreme Court likewise upheld the constitutionality of its split-remedy statute, but decided the question only under the state constitution. *See DeMendoza*, 51 P.3d at 1245-52. It concluded that a plaintiff does not have a vested prejudgment interest in a punitive damages award, but rather has at most an expectation of such an award. *Id.* at 1245. The two state supreme court cases that concluded that the split-recovery schemes violated the Takings Clause involved a different formulation of the statute. In *Smith* and *Kirk*, the split recovery statutes at issue granted the state an interest in the money *proceeds* from the judgment creditor of the punitive award, rather than an interest in the judgment itself from the judgment debtor.

inflicted." U.S. CONST. AMEND. VIII.[21]

The Supreme Court has expressly held that punitive damages awarded to plaintiffs in civil suits do not implicate the Excessive Fines Clause. *Browning-Ferris*, 492 U.S. at 263-64. The language of its holding, however, left open a constitutional challenge to a punitive award when the award serves to benefit the State: "[w]hatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action *nor has any right to receive a share of the damages awarded*." *Id.* (emphasis added). Because the State here does receive a share of the damages awarded,[22] we must address the question left open by the Supreme Court.

Engquist's contention raises a question of first

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[21]The Supreme Court has never expressly held that the Excessive Fines Clause applies to the States. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., dissenting in part and concurring in part) (noting that the other two clauses of the Eighth Amendment have been applied to the states and "see[ing] no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation," she "would hold that the Excessive Fines Clause also applies to the States"). Without deciding the issue, for purposes of our analysis of Engquist's contention, we assume that the Excessive Fines Clause does apply to the States.

[22]Insofar as the Department of Justice is the judgment creditor, the "State" receives a share of the damages awarded, even though the ultimate beneficiaries are victims of crime and there is no actual benefit to the Department.

impression in the courts of appeals.[23] Excessive fines challenges involve a two-step inquiry: (1) whether the Excessive Fines Clause applies, and (2) if so, whether the fine is "excessive." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("Because the forfeiture of respondent's currency constitutes punishment and is thus a 'fine' within the meaning of the Excessive Fines Clause, we now turn to the question whether it is 'excessive.' ").

We reject Engquist's Excessive Fines Clause challenge because the Clause applies only to government acts that are intended to punish, and the split-remedy scheme is not intended to punish

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[23]Two district court cases have addressed Excessive Fines challenges to split-recovery statutes, but the analysis of neither court provides much guidance. In *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1242 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993), the court focused on the fact that Iowa's split-remedy statute gave funds *not* to the state, but to a "civil reparations trust fund to be administered by the courts." The court decided, based on this observation alone, that the Iowa statute "does not provide the State of Iowa with any interest in the punitive damage award" and therefore that no "excessive fine" had been levied. *Id.* The district court in *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) seized upon the Court's language in *Browning-Ferris* in holding that Georgia's split-remedy statute had "the constitutional infirmity as set forth in *Browning-Ferris Industries*, because the State of Georgia would have a right to receive a share of the damages awarded and the excessive fines clause of both the state and federal constitutions would be implicated." The *McBride* court, however, misread *Browning-Ferris* in identifying this per se "constitutional infirmity" because the Court had merely left open the question of whether the Excessive Fines Clause would apply when the government receives a share of the award. *See Browning-Ferris*, 492 U.S. at 263-64.

Engquist. The *Bajakajian* Court stated that "at the time the Constitution was adopted, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Id.* at 327-28 (internal quotation marks omitted). "The Excessive Fines Clause thus limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Id.* at 328 (internal quotation marks omitted). *Bajakajian* ultimately concluded that the statutory provision at issue in that case — which required certain felons to forfeit their currency at sentencing — did implicate the Excessive Fines Clause because it was intended to punish. *Id.* at 328.

**[22]** Because the Excessive Fines Clause applies only to government action that constitutes "punishment for some offense," *id.*, Engquist, as the plaintiff in the underlying action, cannot succeed on her claim.[24] In a somewhat analogous case, the Court of Federal Claims rejected an Excessive Fines Clause challenge brought by taxpayers who objected to a retroactive tax on their Roth IRA. *Kitt v. United States*, 47 Fed. Cl. 821, 827 (Fed. Cl. 2000), *aff'd*, 277 F.3d 1330 (Fed. Cir. 2002). The court decided that because the imposition of the tax is "unrelated to the taxpayer's culpability" and unrelated to the

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[24]Nor does it appear that a defendant could succeed on such a claim. Because the statute does not increase a given defendant's total liability for punitive damages, but merely re-allocates a portion of the award that would otherwise go to the plaintiff, a defendant is not "injured" by the statute, and therefore, in all likelihood, would lack standing to bring a challenge. *See Smelt v. County of Orange*, 447 F.3d 673, 682 (9th Cir. 2006) (summarizing standing requirements of injury, causation, and redressibility).

commission of any "underlying offense," the imposition of the tax is not "punishment" for purposes of the Excessive Fines Clause. *Id.* This reasoning applies equally to the operation of Oregon's split-recovery statute on Engquist's award. No "punishment" of Engquist is involved because operation of the statute is unrelated to Engquist's culpability. Accordingly, we reject Engquist's Excessive Fines Clause argument and affirm the judgment apportioned to the State Account.

## V. The *Corristan* Verdict

### *A. Preclusive Effect*

Engquist next contends that the district court erred in ruling that the jury's finding in Corristan's state court case does not have a preclusive effect in Engquist's case. The district court rejected the preclusion argument, stating that "the jurors could find against Ms. Corristan and not necessarily — the defendant with respect to your client. So I am going to deny the motion on that ground." We review *de novo* the district court's determination whether a prior decision has preclusive effect. *Jacobs v. CBS Broad. Inc.*, 291 F.3d 1173, 1176 (9th Cir. 2002). The "full faith and credit" statute compels federal courts to give collateral estoppel and res judicata effects to the judgments of state courts. *Se. Res. Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 712 (9th Cir. 1992); 28 U.S.C. § 1738. Because federal courts must give the same full faith and credit to a state court judgment as state courts would give the judgment, the question of issue preclusion is examined under Oregon law. *See id.* at 712-13; *see*

*also Dias v. Elique*, 436 F.3d 1125, 1128 (9th Cir. 2006) (stating that the relevant test in federal court is whether the state court decision "meets the state's own criteria necessary to require a court of that state to give preclusive effect" to the decision) (internal quotation marks omitted).

Under Oregon law, the previous litigation of an issue will preclude re-litigation of the same issue if five elements are met: 1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which the state court will give preclusive effect. *Nelson v. Emerald People's Util. Dist.*, 862 P.2d 1293, 1296-97 (Or. 1993). Additionally, when confronted with an assertion of non-mutual issue preclusion, the court should "scrutinize with care any situation where collateral estoppel is asserted by a [nonparty], to make certain no unfairness will result to the prior litigant if the estoppel is applied." *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 550 P.2d 1185, 1188 (Or. 1976) (internal quotation marks omitted). The party asserting estoppel has the burden of proving the elements giving rise to it. *Id.*

Here, Engquist, who was not a party to the case brought by Corristan in state court, contends that the state court judgment and verdict from that case should "collaterally estop Mr. Hyatt from denying

liability to Ms. Engquist for discrimination based upon race and sex because the factual and legal issues litigated in *Corristan* were identical to those in this case." Engquist's argument fails because the issue of discrimination litigated in the *Corristan* suit is not identical to the issue of discrimination in Engquist's suit.

**[23]** No Oregon cases have addressed issue preclusion in the discrimination context. Oregon courts have, however, articulated a strict standard for the "identity of issues" requirement and require that "the precise question was raised and determined in the former suit." *See State v. Hunt*, 985 P.2d 832, 834 (Or. Ct. App. 1999) (internal quotation marks omitted).

Additionally, the Eighth Circuit rejected an argument nearly identical to Engquist's. *See Anderson v. Genuine Parts Co.*, 128 F.3d 1267, 1272-73 (8th Cir. 1997). The defendant in *Anderson* had demoted its two oldest salespersons, and each of the demoted employees brought suit against the company. *Id.* at 1269-70. In the first suit, the jury found the defendant liable for age discrimination. *Id.* at 1270. In a second suit, Anderson argued that the first verdict should have preclusive effect on the issue of age discrimination. *Id.* at 1273. The court rejected that contention, because Anderson did not satisfy the "identity of issues" requirement: "the jury's finding of age discrimination in [the first plaintiff's] demotion would not necessarily eliminate any nondiscriminatory reasons [the defendant] could assert or the jury could find relating to the separate decision to demote Anderson." *Id.* The court

recognized the "numerous similarities" between the two cases, and even acknowledged "the distinct possibility that [the defendant] demoted both men for the same reason," but found the application of issue preclusion would be inappropriate. *Id.*[25]

[24] We agree with the reasoning in *Anderson* and reject Engquist's issue preclusion argument because Engquist failed to satisfy the "identity of issues" requirement.[26]

### *B. Exclusion of the Verdict from Evidence*

The district court granted Defendants' motion in limine to exclude the *Corristan* verdict from evidence and exclude from testimony any mention of the result in *Corristan*. Defendants' motion in limine contended that the evidence from the *Corristan* trial

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[25]The *Anderson* court also distinguished the case before it from *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890 (10th Cir. 1994), a case relied on by Engquist. In *Meredith*, the court applied a jury finding from case one — a finding that the employer had a discriminatory motive in promoting a male employee — to case two, which was brought by a second female employee. The issue was identical in the second case because it involved the employer's motive for promoting the male employee, an issue which remained constant in both cases brought by the female employees. *See Anderson*, 128 F.3d at 1273 (distinguishing *Meredith*).

[26]In addition to the reasons articulated in the text, above, there is now another reason why issue preclusion does not apply here. The *Corristan* verdict rests in part on that jury's finding that Corristan's equal protection and due process rights were violated, rights which we have concluded do not apply in the public employment context, or which the evidence in this case does not support were violated.

and verdict were "irrelevant to the instant case and admission of this evidence would unfairly prejudice Defendants and confuse the jury." The district court did not articulate its reason for excluding the evidence, but merely stated in an oral ruling that,

> "[w]ith respect to . . . the *Corristan* trial and verdict, I'm going to grant the motion [in limine], and that will be excluded. Now, if your reasons for referring to it in trial are, for example, for impeachment, for prior inconsistent statements, then we use the term such as 'other proceedings' or 'another,' something of that nature, so as to sanitize the reference to it."

We review the district court's evidentiary rulings for an abuse of discretion. *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). When the district court fails to make an explicit finding of Rule 403 balancing on the record, however, we review the evidentiary determination *de novo*.[27] *United States v. Boulware*, 384 F.3d 794, 808 n.5 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 337 (2005). In order to establish reversible error, Engquist is additionally required to establish that the error was prejudicial. *Tritchler*, 358 F.3d at 1155. We find prejudice only if the lower court's error more probably than not tainted the verdict. *Mahone v. Lehman*, 347 F.3d 1170, 1172 (9th

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[27] *But see McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1034 (9th Cir. 2003) (reviewing the district court's decision to exclude evidence for abuse of discretion, rather than *de novo*, even though there was no explicit reference to Rule 403, because "it seems likely that the court was concerned about the prejudicial effect" of the evidence).

Cir. 2003).

It is unclear from the record whether the district court's decision to exclude the evidence was based on Federal Rules of Evidence 401/402[28] or Rule 403.[29] Arguments under both rules were raised by Defendants in support of their in limine motion.

**[25]** A state court judgment is relevant evidence and therefore admissible in a later federal suit so long as the judgment has some tendency to prove a fact in issue. *See Boulware*, 384 F.3d at 805. The verdict in favor of Corristan explicitly found that Defendants "discharge[d] or discriminate[d] against [Corristan] because of her gender or ethnicity." While the jury verdict is not direct evidence of discriminatory behavior toward Engquist, it is relevant evidence in that it has some tendency to make the fact of discriminatory behavior by the same Defendants more probable than without the evidence. *See* Fed. R. Evid. 401 (defining relevance); *see also Boulware*, 384 F.3d at 805. Accordingly, the decision to exclude evidence is not supported by Rule 402.

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[28]" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "All relevant evidence is admissible. . . ." Fed. R. Evid. 402.

[29]"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

The district court more likely relied on Rule 403 in deciding to exclude the evidence. Defendants had argued that evidence of the verdict would unfairly prejudice Defendants and confuse the jury. Specifically, Defendants contended that a jury would "likely misconstrue that evidence as proof of discrimination by defendant" or "mistakenly conclude that [the Engquist jury] should reach the same result." In the district court's oral decision to exclude the evidence, the court said the *Corristan* evidence could be used for impeachment purposes, but the parties must use the term " 'other proceedings' or 'another,' something of that nature, so as to sanitize the reference to it." The court's use of the term "sanitize" indicates that its decision was motivated by concerns about undue or unfair prejudice.

Commentators agree that most courts forbid the mention of verdicts or damage amounts obtained in former or related cases. *See* 75A AM. JUR. 2d *Trial* § 628; D.C. Barrett, *Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein*, 15 A.L.R. 3d 1101 (summarizing cases). Moreover, in a case similar to the one at bench, the Third Circuit "disapprove[d]" of the introduction of a prior verdict against the same defendant, because "[a] jury is likely to give a prior verdict against the same defendant more weight than it warrants." *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir. 1975). The court specifically noted that "admission of a prior verdict creates the possibility that the jury will defer to the earlier result." *Id.*

This conclusion runs counter to our conclusion in *Boulware* that a prior state court judgment was admissible under Rule 403 balancing. *See Boulware*, 384 F.3d at 808. The state court judgment in that case, however, posed much less danger of jury confusion than in *Coleman*. In *Boulware*, the district court excluded evidence of a prior state court civil judgment that found the defendant's company owned the money that the defendant gave to his girlfriend. *Id.* at 802. This judgment, had it been admitted, would have been used by the defendant at trial to rebut the government's argument that the defendant personally owed tax liability on that sum of money. *Id.* at 808. We held that, under the circumstances of that case, the trial judge could have easily controlled any danger that the jury would give undue weight to the state court judgment and also controlled any waste of time or confusion of the issues. *Id.*

**[26]** Engquist's case, however, bears much greater similarity to *Coleman* than to *Boulware*. In *Boulware*, the single issue decided by the state court in the earlier case was a distinct civil cause of action that only related to one component of *Boulware*'s criminal prosecution. Such a situation presents a much smaller risk of prejudice or confusion of the issues; additionally, the state court judgment was highly probative of the defendant's tax liability. In the instant case, as in *Coleman*, there was a substantial risk that the jury would import the whole verdict of liability from the prior proceeding. Moreover, the testimony and evidence from the *Corristan* trial, including Corristan's own testimony, was presented to the jury in this case; the only evidence *not* presented to the jury was the *Corristan*

verdict. The verdict itself did not possess such additional probative value, beyond the *Corristan* evidence, to overcome the risk of prejudice and confusion that the verdict posed. Accordingly, we conclude that the district court did not abuse its discretion in granting Defendants' motion in limine to exclude the *Corristan* verdict from evidence.

## CONCLUSION

We reverse the judgment on the constitutional claims because the equal protection claim is invalid as a matter of law, and there is insufficient evidence to support the substantive due process claim. We vacate the damages and attorneys' fees awards, and remand to the district court to determine what portion of these awards can be supported by Engquist's successful state law tort verdict. The district court did not err in awarding a portion of the punitive damages award to the State's Criminal Injuries Compensation Account, and thus we affirm that portion of the judgment. Nor did the court err in declining to give the *Corristan* verdict preclusive effect and in excluding the verdict from evidence. Each party shall bear her or his own costs on appeal.

The judgment is **REVERSED** on the constitutional claims, the damages and attorneys' fees awards are **VACATED,** and the case is

**REMANDED** to the district court for further proceedings consistent with this opinion.

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REINHARDT, Circuit Judge, dissenting:

I dissent. Unlike the majority, I agree with the other circuits that the class-of-one theory of equal protection is applicable to public employment decisions. Accordingly, I would uphold the jury's verdict on the equal protection claim, including its award of $175,000 in compensatory damages and $125,000 in punitive damages. I concur in the majority's holding as to the takings clause issue, although for somewhat different reasons. Thus, I would also affirm the district court's award to Engquist of an additional $50,000, consisting of forty percent of the total $125,000 punitive damages awarded in connection with the state law claim. Because I would uphold the jury verdict in its entirety, I would not remand the case to the district court.

The majority's holding relating to the class-of-one theory of equal protection creates inter-circuit conflict, is at odds with the precedent of the Supreme Court and of this circuit, and is not justified by the policy concerns raised by the majority. Every other circuit to have considered this question has applied the class-of-one theory to employment. *See, e.g., Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006); *Whiting v. Univ. of S. Mississippi*, 451 F.3d 339, 348-50 (5th Cir. 2006); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006); *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005); *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2004); *Campagna v. Massachusetts Dep't of Envtl. Prot.*, 334 F.3d 150, 156 (1st Cir. 2003); *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143, 1149 (10th Cir. 2001). Even before the Supreme Court articulated the class of-one principle in *Village of*

*Willowbrook v. Olech*, 528 U.S. 562 (2000), other circuits recognized it as a straightforward application of equal protection principles. *See, e.g.*, *Ciechon v. City of Chicago*, 686 F.2d 511, 522-23 (7th Cir. 1982).

The majority's position is also at odds with the approach taken by this circuit. Until now, we have recognized that a class-of-one equal protection claim is no different from any other equal protection claim that does not involve a protected class. For example, *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004), which applied the class-of-one theory to the differential enforcement of environmental regulations on ski resorts, employed the rational basis test defined in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the same test that we employ in other equal protection cases. *See also Valley Outdoor Inc. v. City of Riverside*, 446 F.3d 948, 955 (9th Cir. 2006); *Seariver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 679-80 (9th Cir. 2002). Although this circuit has not previously considered the class-of-one theory in the employment context, nothing in our earlier cases suggests that, contrary to the view of all the other circuits to have considered the question, it is not applicable to employment cases. Indeed, the majority does not identify a single case in our equal protection jurisprudence or that of any other circuit that limits equal protection rights in the context of public employment.

The majority's approach is also at odds with Supreme Court precedent. The Supreme Court has made clear that people have a right not to be singled

out by the government for arbitrary and irrational treatment. *Olech*, 528 U.S. at 564. Of course, courts must be most cautious, and apply a higher standard of review, when the government treats groups differently on the basis of certain protected characteristics; but even when a protected class is not involved, government actions must be supported by a rational basis. *City of Cleburn v. Cleburn Living Ctr.*, 473 U.S. 432, 448-49 (1985). Thus, we must find that an employee's equal protection rights are violated when he is "intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564.

The majority attempts to distinguish *Olech* because that case involved a regulatory decision, rather than an employment decision. The majority argues that a distinction in treatment under the equal protection clause between employment and regulatory actions is justified because the state has greater powers when it acts as a regulator than when it acts as an employer. The majority is correct that there are differences between the state's powers in the two realms. However, unlike in the First and Fourth Amendment contexts, upon which the majority relies, the Court has not limited the Fourteenth Amendment's scope as applied to public employment. *See Washington v. Davis*, 426 U.S. 229 (1976); *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003) (applying gender-ased equal protection case law from outside the employment context to public employees). Few circuit courts have given any consideration to the idea that the class-of-one doctrine does not apply to

employment, and none has ever so held. Furthermore, even in the First and Fourth Amendment contexts, in which courts have concluded that some limitations on individual rights are necessary to facilitate government employment, federal employees do not give up their rights to be free from hostile, arbitrary, and malicious treatment by the government. *See Garcetti v. Ceballos*, 126 S.Ct. 1951, 1958 (2006) ("[P]ublic employees do not surrender all their First Amendment rights by reason of their employment."); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664 (1989) ("Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer.").

Although the majority acknowledges that its position is at odds with that uniformly taken by other courts, it disregards this conflict because it is needlessly concerned that the class-of-one rule would eliminate at-will employment. There is no cause for the majority's concern. The application of class-of-one equal protection principles is hardly fatal to at-will employment. The rational basis test has always been used to insulate governmental decisions from searching review that would interfere with governmental functions, while still protecting individuals against heinous governmental conduct. The rational basis test can play this role as successfully here as in other equal protection cases. It is certainly not necessary, in order to preserve the concept of at-will employment, to hold that the government may freely treat its employees

maliciously and irrationally.

The majority, nevertheless, views the requirement set forth in *Squaw Valley* that government conduct not be "malicious, irrational, or plainly arbitrary" as inherently at odds with at-will employment. It apparently believes that arbitrary treatment of public employees is a necessary and acceptable part of public employment. I disagree. Moreover, the *Squaw Valley* test is not as threatening to at-will employment as the majority believes: it would not render all discharges that are not for just cause unconstitutional. Rather, in the present context as in the context of statutory interpretation, "plainly arbitrary" must be construed in relation to the other words in the clause. *See United States v. King*, 244 F.3d 736, 740-41 (9th Cir. 2001) ("[W]ords are to be judged by their context and . . . words in a series are to be understood by neighboring words in the series." (quoting *United States v. Carpenter*, 933 F.2d 748, 750-51 (9th Cir. 1991))). Accordingly, actions are "plainly arbitrary" in the sense of being violative of the equal protection clause only if they include an element akin to irrationality or malice. Thus, for example, an employer would not violate the equal protection clause if he were to lay off every fifth employee, even though the selection criteria might appear rather arbitrary in the non-contextual sense of the term. It would, in contrast, be a violation of the plainly arbitrary provision if a supervisor were summarily to fire an employee because the employee's sister refused his sexual advances.

Moreover, the experience of other circuits demonstrates that the class-of-one theory of equal protection is not in practice fatal to at-will employment. The seven circuits that have recognized the theory continue to have at-will employment. The government is able to terminate employees in these circuits for no reason, or for any reason that does not violate the equal protection clause. Nor are those circuits drowning in the "flood" of class-of-one employment disputes feared by the majority. Rather, as the majority notes, those circuits have set standards for assessing class-of-one employment disputes such that petitioners win only in extreme cases. The lack of success of most plaintiffs in these circuits demonstrates the ability of the courts to allow for recovery under the class-of-one theory without constitutionalizing every employment dispute.

The courts that have considered the application of the class-of-one theory to employment have used three, overlapping techniques to limit its reach. The Second Circuit, and the Seventh Circuit have, in some instances, required the petitioner to identify an identically situated individual who was not discriminated against. *See, e.g., Neilson*, 409 F.3d at 104; *Indiana State Teachers Ass'n v. Bd. of Sch. Comm's*, 101 F.3d 1179, 1181-82 (7th Cir. 1996). Others require a showing of animus or malice. *See Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004) (applying this standard and collecting cases). The third group applies the rational basis test, putting the burden on the petitioner to disprove any rational reasons brought forward by the petitioner. *See, e.g., Whiting*, 451 F.3d at 349; *Lauth*

*v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005).

The best approach, that adopted by this circuit in a regulatory case, *Squaw Valley*, authored by Judge Tashima, includes aspects of all three techniques. A plaintiff must show both that he was treated differently than others and that there was no rational basis for this treatment. *Squaw Valley*, 375 F.3d at 944 (quoting *Olech*, 528 U.S. at 564). A plaintiff can show that he was treated differently either by comparing his treatment to that of someone very like himself, or by showing that the government's treatment of him was motivated by undeserved malice.[1] *See Squaw Valley*, 375 F.3d at 945, 947 (finding no similarly situated comparator but still finding for the plaintiff under a class-of-one theory because the defendant "harbor[ed] actual 'hostility' and 'antagonism' " for the plaintiff). There is no need for an identically situated comparator in cases involving malice because the government does not ordinarily treat people maliciously, and, thus, is obviously treating individuals unequally under such circumstances.[2] *Id.*

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[1]This is not to say that an employer cannot act on his dislike of an employee where that dislike has its roots in the employee's mediocre performance or lack of initiative, or in some other response to the individual not based on malice or irrationality, even if the employee has met the minimum requirements of the job.

[2]Although the majority believes that requiring malice would be inconsistent with *Olech*, I do not suggest such a requirement here. I simply assert that a showing of malice as the cause is enough to show that an individual was subjected to differential treatment.

The plaintiff can show that no rational basis exists in a class-of-one case by showing than an "asserted rational basis was merely a pretext for different treatment." *Squaw Valley*, 375 F.3d at 945-46 (internal quotations omitted). Such pretext may be shown by demonstrating "either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." *Squaw Valley*, 375 F.3d at 946. As to the second prong, reasons that are "malicious, irrational or plainly arbitrary" cannot provide a rational basis. *Armendariz*, 75 F.3d at 1326; *see also Cleburn Living Ctr.*, 473 U.S. at 448-49; *Scarbrough*, 470 F.3d at 261. Thus, malice can in some circumstances serve as a basis for showing both disparate treatment and lack of rational basis.

Under this test, I would affirm the district court's determination that Engquist's equal protection rights were violated. Engquist presented her case on the theory that Szczepanski and Hyatt were acting out of malice. The jury agreed, finding that Engquist's termination was "arbitrary, vindictive or malicious." Accordingly, Engquist has demonstrated that she was singled out to be the target of government malice and that this malice was the cause of her termination.[3]

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[3]I note that the majority objects only to the class-of-one theory and does not argue that, if such a standard is applicable, Engquist failed to assert sufficient evidence to establish a violation. The State likewise focuses its attack on the class-of-one theory and raises a sufficiency of the evidence claim only as to Engquist's failure to point to any individual situated identically to herself. As I note, however, an identically situated comparator is not required in cases of malice.

I see no reason to abandon the test that Judge Tashima thoughtfully endorsed for the court in *Squaw Valley*. I certainly would not reject it in favor of a rule that conflicts with that adopted by every other circuit to consider this question. Accordingly, I dissent from the majority's reversal of the finding of liability on the equal protection count and would affirm both the compensatory and punitive damages in that regard.

On the takings clause question, I agree with the majority's holding that the punitive damages provisions of Oregon law do not violate the takings clause. I reach this conclusion because the plaintiff has no interest at all in punitive damages, which exist to punish the defendant rather than to reward the plaintiff, unless and until such interest is created by state law.[4] Under its statute, Oregon chose to give the plaintiff an interest in only forty percent of the amount that the jury assesses against the defendant on a state claim for malicious conduct. The plaintiff is never afforded possession of or any right to the other sixty percent of the award, as that money is awarded directly to the state in the court's judgment. Under such circumstances, the majority is correct that the plaintiff has no property right in that other sixty percent. Accordingly, I concur in the majority's holding and would leave Engquist's forty percent punitive damages award on the state claim

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[4]A different rule might apply if the state took a share of punitive damages awarded under federal law, but that is not at issue in this case.

unchanged.[5]

In sum, I would conclude that the district court did not err in holding that Engquist's equal protection rights were violated and would affirm the award of general and punitive damages on the basis of that claim.[6] I would also affirm the apportionment of the punitive damages relating to the state law claim. Because I would uphold the general and punitive damages on the equal protection grounds and the apportionment of the punitive damages on the state law claim, I would affirm the district court judgment in its entirety. I respectfully dissent.

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[5]Like the majority, I reject Engquist's other arguments relating to the apportionment of punitive damages.

[6]I agree with the majority as to the substantive due process claim. However, because the damages for the substantive due process violation were merged into the larger sums awarded for the equal protection clause violation, my conclusion as to the equal protection clause is sufficient to support the entire federal damages award. Thus, the majority's conclusion as to substantive due process does not affect the outcome in any manner. I likewise agree with the majority's conclusions relating to the exclusion of the Corristan verdict.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANUP ENGQUIST,

Plaintiff-Appellee
and Cross-Appellant,

v.

OREGON DEPARTMENT
OF AGRICULTURE;
JOSEPH (JEFF) HYATT;
JOHN SZCZEPANSKI,

Defendants - Appellants and
Cross-Appellees.

Nos. 05-35170, 05-35263
DC No. CV 02-1637 AS
D. Or., Portland

**ORDER**

Before: REINHARDT, TASHIMA, and GRABER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing, with Judge Reinhardt voting to grant it. Judge Graber votes to deny the petition for rehearing en bane and Judge Tashima so recommends. Judge Reinhardt votes to grant the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

**31.735 Distribution of punitive damages; notice to Department of Justice; order of application.**

(1) Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

(a) Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph, in the amount agreed upon between the attorney and the prevailing party. However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party.

(b) Sixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

(2) The party preparing the proposed judgment shall assure that the judgment identifies the

judgment creditors specified in subsection (1) of this section.

(3) Upon the entry of a verdict including an award of punitive damages, the prevailing party shall provide notice of the verdict to the Department of Justice. In addition, upon entry of a judgment based on a verdict that includes an award of punitive damages, the prevailing party shall provide notice of the judgment to the Department of Justice. The notices required under this subsection must be in writing and must be delivered to the Department of Justice Crime Victims' Assistance Section in Salem, Oregon within five days after the entry of the verdict or judgment.

(4) Whenever a judgment includes both compensatory and punitive damages, any payment on the judgment by or on behalf of any defendant, whether voluntary or by execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to punitive damages awarded against that defendant unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

(5) Whenever any judgment creditor of a judgment which includes punitive damages governed by this section receives any payment on the judgment by or on behalf of any defendant, the judgment creditor receiving the payment shall notify the attorney for the other judgment creditors and all sums collected shall be applied as required by

subsections (1) and (4) of this section, unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment. [Formerly 18.540]

## Section 1, Amendment XIV to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Amendment V to the United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Amendment VIII to the United States Constitution

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

# OPPOSITION BRIEF

No. 97-474

IN THE

# Supreme Court of the United States

ANUP ENGQUIST,

Petitioner,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF FOR RESPONDENTS OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, AND JOHN SZCZEPANSKI IN OPPOSITION


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## QUESTIONS PRESENTED

The Ninth Circuit majority held that class-of-one equal protection analysis does not apply in the public employment context. In reaching that conclusion, the court contrasted government's role as an employer, where its powers are broad, with its role as a regulator. The court also noted that, in other areas of constitutional law, this Court has limited the rights of public employees as compared to ordinary citizens. The Ninth Circuit was concerned that applying class-of-one analysis in the public employment context could invalidate the practice of at-will employment and lead to an influx of new cases in federal court.

The first question presented is:

1. Whether this Court should grant certiorari: (a) when the Ninth Circuit's decision is not in conflict with any decision of this Court, (b) when its decision is solidly grounded in this Court's jurisprudence limiting judicial review of public employment decisions, (c) when the class-of-one issue presented is less significant than petitioner suggests, (d) when, although admittedly the Ninth Circuit's decision creates a circuit split, other federal appellate courts have tended merely to assume that class-of-one analysis applies in the public employment context and have had little time to consider and react to the Ninth Circuit's decision, and (e) when this case in all events is a poor vehicle to use to review the issue, because petitioner failed to prove that any other employees were similarly situated, and because she ultimately would lose on grounds of qualified immunity?

The State's split-recovery punitive damages statute provides that, upon entry of a verdict that includes punitive damages, 60 percent of punitive damages are allocated to a state fund that assists crime victims and their families. In two separate opinions, the Ninth Circuit panel unanimously held that statute does not effect a taking under the Fifth Amendment. The majority relied on the fact that a plaintiff has no more than an uncertain expectation that he or she will be awarded punitive damages. The majority also focused on the purposes for imposing punitive damages, which have nothing to do with compensating the plaintiff. The dissent agreed with the majority's conclusion, but took a more direct approach. The dissent emphasized that, under state law, a plaintiff never is afforded possession of or any right to sixty percent of a punitive damages award, as that money is awarded directly to the State.

The second question presented is:

2. Should this Court issue a writ: (a) when there is no true split among state Supreme Courts that have considered whether split recovery statutes "take" private property, but where there are instead significant differences between some States' statutes, (b) when petitioner cannot identify any independent source of law that gives her a property interest in punitive damages that attaches at or before the moment when the verdict is entered, and (c) when the Ninth Circuit's decision is not contrary to any decision of this Court?

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## STATEMENT OF THE CASE

### A. Statement of Facts

#### 1. The promotion

Petitioner was hired in 1992 to work as a Program Technician 1, International Food Standards Specialist, for the Export Service Center (ESC), one of two laboratories making up the Oregon Department of Agriculture's (ODA's) Laboratory Services Division. (E.R. 129-31; E.R.181-83; E.R. 114).[1] Her job was initially funded under a grant to develop a database of food additives, laws, and regulations for several different countries. (E.R. 129-31). While she traveled under that grant, she also began to market ESC's services, which include testing and certifying exported foods and providing consulting services for companies who wish to export food overseas. (E.R. 131-33). Eventually, petitioner began to market ESC's services at trade shows and to provide consulting services to clients who wanted to formulate a product that complied with a specific country's regulations. (E.R. 133-37).

In 1999, the ESC manager, Gary Carter, left the ODA. (E.R. 136). The position remained vacant for almost two years, with an ESC chemist serving as the interim acting manager and petitioner absorbing some of Carter's former duties. (E.R. 152-53; E.R. 185-88).

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[1] The citations are to the record before the Ninth Circuit Court of Appeals.

During the summer of 2001, however, defendant John Szczepanski—the ODA Assistant Director in charge of overseeing the Laboratory Services Division—started to develop some concerns about the continued viability of the ESC in the marketplace. To address those concerns, then-ODA Director Phil Ward appointed Szczepanski to directly oversee ESC's operations. (E.R. 229; E.R. 245-46; E.R. 290-91; E.R. 103). Shortly after he was appointed to oversee ESC's operations, Szczepanski learned that ESC was on the cusp of losing its wheat-testing business—75 percent of its revenue—to a private laboratory that offered "lower prices and better service." (E.R. 296-98). Because ESC's budget operated almost entirely on fees charged for its services to exporters—rather than funding provided by tax revenues—the loss of wheat-testing revenue was devastating to ESC. (E.R. 289, 297). After learning this news, Szczepanski made it a priority to fill the ESC manager position that still remained vacant with someone who could guide the laboratory through the difficult financial period. (E.R. 298).

Petitioner and defendant Joseph (Jeff) Hyatt—who had worked at the ODA since 1990—both applied for the ESC manager position. (E.R. 141; E.R. 227). Although petitioner had a more extensive educational background and more experience with the consulting and customer-service aspects of the position, Hyatt was offered the promotion. (E.R.143; E.R. 155-57; E.R. 226). At trial, Szczepanski proffered several justifications for his choice. Specifically, Szczepanski indicated that he chose Hyatt over petitioner because he felt that Hyatt's experiences starting his own

coffee company, developing business plans, managing budgets, running retail establishments, and working as a supervising chemist within the agency gave Hyatt the entrepreneurial, managerial, and marketing skills ESC needed. (E.R. 243; E.R. 300-02). Szczepanski also explained that, because Hyatt previously had worked as a chemist for the division, he understood what it takes to run a laboratory and, if need be, could "work the bench" as a chemist alongside his subordinates. (E.R. 302).

Petitioner did not get a promotion. Rather, as explained below, her position was eliminated and she was laid off several months later.

**2. The lay off**

In late 2001, ESC, which operated almost entirely on fee-based revenues, was running in the red because it had lost its wheat-testing business. (E.R. 216; E.R. 304-05). At that same time, the State of Oregon, along with the rest of this nation, began falling into a recession. That recession, exacerbated by the events of September 11, 2001, led to a significant revenue shortfall for the State's 2001-2003 budget. (E.R. 104). In October 2001, the governor asked state agencies funded by tax and lottery revenues to immediately begin discussing budget-reduction proposals based on the governor's office's recommendations and guidelines. (E.R. 104). The governor instructed that budget cuts should be swift and long lasting and urged agencies to develop proposals that included "eliminating or restructuring

programs." (E.R. 104; *see also* E.R. 205, 213; E.R. 223).[2]

In response to that directive, in November 2001, defendant Szczepanski submitted a plan to address the Laboratory Services Division's budget problems. (E.R. 230-31). In that plan, he suggested that the department could reorganize the Laboratory Services Division by consolidating its two physically separate laboratories—the regulatory laboratory and the ESC—into one laboratory, allowing the laboratories to share operating costs, including employees, equipment, and rent. (E.R. 204; E.R. 220; E.R. 228; E.R. 231-37; E.R.108, 109). The regulatory laboratory, unlike the ESC, is funded from the State's general fund, and was subject to the budget-cutting directive. Thus, the purpose of the laboratory reorganization was two-fold: (1) it would reduce the regulatory laboratory's general-fund expenditures; and (2) it would address ESC's financial problems resulting from the loss of wheat-testing business. (E.R. 206, 216; E.R. 228; E.R. 231-33, 236-7; E.R. 108, 109).

As a result of ESC's loss of wheat-testing revenue and as part of the reorganization, petitioner's Program Technician 1, Food Standards Specialist, position—the only position at the ODA with that classification and description[3]—was chosen for layoff.

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[2] The State is not allowed to "run in the red." Or. Const. Art. IX, § 6.

[3] Petitioner's position was one of only two Program Technician 1 positions at the ODA and the only "Food

Four "Chemist" positions were also chosen for layoffs in 2002; five additional positions were terminated in 2003. (E.R. 241-43; E.R. 308; E.R. 114, 115).[4]

**3. Petitioner's bumping request**

Petitioner's layoff notice explained that her termination "does not reflect adversely on [her] performance, but [was] the result of reorganization." (E.R. 114). It also explained that she had five days to select one of the three options available pursuant to her collective-bargaining agreement. (E.R. 114). She could elect to (1) displace the ODA employee with the lowest seniority in her current classification in a position for which she was qualified; (2) demote to the lowest senior position in any classification in the ODA for which she was qualified; or (3) be laid off. (E.R.126; E.R. 121; E.R. 196-201).

Unfortunately, there was only one other position classified as "Program Technician 1" within the entire agency. (E.R. 115). When she received notice of her layoff, petitioner was provided with information

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Standards Specialist" position in the entire agency. (E.R. 114, 115).

[4] The reorganization ultimately reduced the size of both the regulatory lab and the ESC, making it possible for the programs to share employees. At the time of trial, ESC's revenues were exceeding its expenses, which allowed the agency to lower the rates it charges for regulatory lab services. (E.R. 310-11; E.R. 314-16).

about that position, as the Grants Administrative Officer for the Natural Resources Division. (E.R. 196-200; E.R. 110, 114, 120). Petitioner understood that, pursuant to the collective-bargaining agreement, she would be allowed to bump into that position only if she was capable of performing the specific requirements of the position within a 30-day orientation period. (E.R. 146-47; E.R. 165-67; E.R. 196; E.R. 114). Petitioner's second option—taking a demotion—would have provided quite a few more options, but petitioner would have had to take a pay cut if she chose that option. (E.R. 197-98, 200-01).

Petitioner chose the first option—that is, she elected to attempt to displace the only other ODA employee occupying a Program Technician 1 position. (E.R. 196-97; E.R.115; E.R. 126). Petitioner was not allowed to bump into that position, however, because the ODA human resource manager, Karin Nilsson, determined that she did not have the requisite experience to perform the job within 30 days. Specifically, Nilsson concluded that petitioner did not have sufficient "knowledge of the functions, laws, statutes, rules, policies or procedures of the Soil and Water Conservation Districts, or the Agricultural Water Quality Management Program," and that it was not possible for someone without previous knowledge and experience with those matters to become familiar enough with them to "perform the duties of this job adequately with only a 30-day orientation period." (E.R. 110, 115).

**B. District court proceedings**

As noted, petitioner worked for the ESC from 1992 until she was laid off in February 2002. Shortly after her layoff, she brought this lawsuit alleging, among other things, that her supervisors at the ODA, defendants Hyatt and Szczepanski, subjected her to harassment, denied her a promotion, deprived her of bumping rights, retaliated against her, and terminated her employment in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. (E.R. 1, 4-6). Petitioner also brought a state-law claim for intentional interference with her employment relationship, and sought economic, noneconomic, and punitive damages, as well as attorney fees and costs. (E.R. 6-7).

Defendants filed an answer in which they asserted that petitioner failed to state a claim upon which relief could be granted and that they are entitled to qualified immunity. (E.R. 8, 13-15). Defendants subsequently filed a motion for summary judgment. (E.R. 19-26). The district court later issued an order granting defendants' motion for summary judgment in part and denying it in part. (E.R. 27). The court declined to grant summary judgment in defendants' favor on several of plaintiff's claims. (E.R. 50-52).

Defendants subsequently filed a motion for partial summary judgment, seeking to narrow the scope of petitioner's broadly pleaded equal-protection claim. (E.R. 58). In their memorandum in support of this motion, defendants asserted that, to the extent plaintiff's equal-protection claim rested on a class-of-one theory, it failed as a matter of law because: (1)

that theory does not apply to public-employment decisions; (2) petitioner had failed to identify other similarly situated employees; and (3) defendants are entitled to qualified immunity on that aspect of petitioner's claim. (E.R. 61-78). The district court denied defendants' motion, concluding that "there are genuine issues of fact as to whether p[etitioner] was singled out as a result of animosity" and inviting defendants to develop a record on the qualified-immunity issue at trial. (E.R. 79, 80, 88).

Defendants renewed their challenges to the class-of-one theory in their trial memorandum. (E.R. 97, 99). Defendants also moved in limine to exclude evidence in support of plaintiff's class-of-one theory. (E.R. 89, 92). The district court denied those motions, except that it agreed that petitioner could prove her class-of-one theory only if she could demonstrate that other similarly situated persons were treated differently. (E.R. 95).

The remaining claims proceeded to an 11-day jury trial, focusing in large part on petitioner's theory that Hyatt and Szczepanski had hatched and executed a plan to "get rid of" her because of her race, color, gender, or national origin or for arbitrary, malicious, or vindictive reasons. (*See, e.g.*, E.R. 326, 10B Tr. 14-18 (petitioner's closing argument)). As proof of this plan, petitioner relied primarily on evidence that, before Hyatt was promoted to the ESC manager position, he and Szczepanski each had told people that they had been working on a plan to "get rid of" petitioner. (E.R. 177, 2 Tr. 95, 112-13; E.R. 326, 10B Tr. 14-15).

After petitioner rested her case-in-chief, defendants orally moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, renewing the challenges to the class-of-one theory they had raised on summary judgment. (E.R. 247, 6 Tr. 31-70). Defendants also asserted that they are entitled to qualified immunity on that claim. (E.R. 248, 6 Tr. 32-35). Defendants renewed their motions again at the close of their case-in-chief. (E.R. 319, 9B Tr. 17-19; *see also* E.R. 333). Defendants also objected to the jury instructions on the class-of-one theory contending that it was inappropriate for the district court to submit that claim to the jury. (E.R. 331, 10B Tr. 151).

Ultimately, the jury rejected all of petitioner's claims against the ODA and many of the claims against Hyatt and Szczepanski, including her claims relating to discrimination on the basis of a suspect classification. (E.R. 334). The jury nonetheless concluded that defendants Hyatt and Szczepanski violated petitioner's equal-protection rights and intentionally interfered with her employment relationship for other improper reasons—*i.e.*, out of malice or for arbitrary or vindictive reasons. (E.R. 336-38).[5]

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[5] The jury also ruled in petitioner's favor on her substantive due process claim, but the Ninth Circuit later reversed, concluding that petitioner had not presented sufficient evidence to sustain that claim. *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 999 (9th Cir. 2007).

Specifically, the jury found that Hyatt and Szczepanski (1) "intentionally treat[ed] the plaintiff differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive, or malicious reasons"; (2) "subject[ed] plaintiff to arbitrary and unreasonable actions causing [her] to be unable to pursue her profession"; and (3) "intentionally interfere[d] with the plaintiff's employment relationship through improper means or for an improper purpose by causing the loss of promotion, the loss of bumping rights or causing the termination of employment." (E.R. 336-38). The jury awarded economic, noneconomic, and punitive damages for each claim totaling $425,000. (E.R. 336-38, 374-76).

Following the verdict, defendants Hyatt and Szczepanski filed a written motion for judgment as a matter of law on each of the claims on which the jury found in plaintiff's favor. (E.R. 340-71). The district court denied that motion as well. (E.R. 372, 373). The district court entered judgment in favor of petitioner and against Hyatt and Szczepanski on the class-of-one, substantive-due-process, and intentional-interference claims and dismissed all other claims against defendants. (E.R. 374). The district court also awarded petitioner $172,740 in attorney fees, $5,073.58 in out-of-pocket expenses, and $16,322.58 in costs on her claims against defendants Hyatt and Szczepanski. (E.R. 379, 385).

### C. The Ninth Circuit's decision

The Ninth Circuit panel majority held "that the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees." *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007). The majority noted that, in other contexts, that court had applied class-of-one analysis, but the court had not yet decided "whether class-of-one theory should be extended to public employment decisions." *Id.* at 993. Ultimately, the majority determined that the class-of-one theory should not apply in this context. The State was acting as an employer, a setting in which its powers are broader than when government acts as a regulator, and in which "the scope of judicial review is correspondingly restricted." *Id.* at 994. The court also observed that "[i]n other areas of constitutional law, the [United States Supreme] Court has limited the rights of public employees as compared to ordinary citizens." *Id.* (citations omitted). The court concluded that "[t]he class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens." *Id.* at 995.

The panel also thought that "[a] judicially-imposed constitutional proscription of arbitrary public employer actions would * * * upset long-standing personnel practices." *Id.* "[E]mployers have traditionally possessed broad discretionary authority in the employment context." *Id.* And "[t]he power of employers to discharge employees for reasons that may appear arbitrary, unless constrained by contract

or statute, is well-established under the common law of at-will employment." *Id.* (citations omitted). Applying equal protection class-of-one theory "to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of at-will employment." *Id.* (citation omitted). The panel declined to "effect such a significant change in employment law[.]" *Id.* The panel also was concerned that "applying the class-of-one theory to public employment would * * * generate a flood of new cases." *Id.* Although the panel recognized and discussed this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), the panel concluded that brief opinion was "too slender a reed on which to base such a transformation of public employment law." *Id.* at 996. For those reasons, the panel majority held that the class-of-one theory does not apply to a public employer's decisions regarding its employees. *Id.*

On this point, the dissent disagreed. The dissent noted that the "[t]he majority's holding relating to the class-of-one theory of equal protection creates inter-circuit conflict." *Id.* at 1011. The dissent also suggested that "[t]he majority's approach is * * * at odds with" this Court's precedent, citing *Village of Willowbrook v. Olech*. *Id.* The dissenting judge would have affirmed the award of damages on the class-of-one claim. *Id.* at 1014-15.

With regard to petitioner's takings claim concerning the State's so-called "split recovery" statute, in which the state Department of Justice is made a judgment creditor and 60 percent of punitive

damages are paid to an account that benefits crime victims, the Ninth Circuit majority held that whether this statute violates the takings clause of the Fifth Amendment, which forbids the taking "of private property * * * for public use, without just compensation," involves a two-step analysis. First, the court "determines whether the subject matter is 'property' within the meaning of the Fifth Amendment and, second, [the court] establish[es] whether there has been a taking of that property, for which compensation is due." *Id.* at 1002 (citation omitted). The court observed that in this case the dispute "focuses on the first step, *i.e.*, whether a punitive damages award constitutes property under the Takings Clause." *Id.* at 1002 (footnote omitted).

Although "[t]he question of whether punitive damages awards qualify as property for purposes of the Takings Clause is a question of first impression in the federal courts," the majority held such awards are not property after looking at two analogous lines of cases, those involving interest as property and those examining whether statutory changes to causes of action can be considered takings. *Id.* at 1002-04. In each instance, the court determined, the certainty of the expectation of the person claiming a property interest was crucial. *Id.* In addition, the majority looked to the purposes for imposing punitive damages, which are to punish and deter unlawful conduct. *Id.* at 1004, citing *BMW of N. Am., Inc v. Gore*, 517 U.S. 559, 568 (1996). The majority also canvassed state supreme court decisions regarding this question, including one from Oregon, and concluded that its "holding that punitive damages are

not cognizable as property under the Takings Clause is * * * in accord with the conclusions reached by a majority of state supreme courts who have considered the issue." *Engquist*, 478 F.3d at 1005.

The dissent agreed, but took a more direct approach, reaching its conclusion that there was no taking

> because the plaintiff has no interest at all in punitive damages, which exist to punish the defendant rather than to reward the plaintiff, unless and until such interest is created by state law. Under its statute, Oregon chose to give the plaintiff an interest in only forty percent of the amount that the jury assesses against the defendant on a state claim for malicious conduct. The plaintiff is never afforded possession of or any right to the other sixty percent of the award, as that money is awarded directly to the state in the court's judgment. Under such circumstances, the majority is correct that the plaintiff has no property right in that other sixty percent.

*Id.* at 1014 (Reinhardt, J., dissenting).

## SUMMARY OF ARGUMENT

Petitioner urges this Court to review two issues: (1) whether class-of-one equal protection analysis applies to claims based on adverse action taken against a public employee; and (2) whether a state statute that allocates part of a punitive damages award to a state fund for crime victims upon entry of

the verdict effects a taking of private property. Neither claim warrants this Court's review.

The Ninth Circuit's decision, holding that class-of-one analysis does not apply in the public employment context, does not conflict with any decision of this Court, and is based on this Court's recognition of the significant differences between government's role as an employer and its role as a regulator. In addition, the issue is not as significant as petitioner suggests. There are many public employees, but almost no successful class-of-one public employee claims. The Ninth Circuit's decision creates a circuit split, but other courts have not given thoughtful consideration to this issue and other courts have had little time to react to the Ninth Circuit's decision. In addition, this case is not a good vehicle for review because petitioner did not prove that other similarly situated employees were treated differently and because she ultimately would lose in any event because defendants would be entitled to qualified immunity.

The Ninth Circuit also rejected petitioner's claim that the State's split-recovery punitive-damages statute violates the takings clause. That claim does not warrant review because, contrary to petitioner's argument, there is no split among state courts regarding such statutes, because petitioner cannot identify any independent source of law that gives her a property interest in punitive damages that attaches at or before the moment when the verdict is entered, and because the Ninth Circuit's decision is not contrary to any of this Court's decisions.

## REASONS FOR DENYING THE PETITION

### A. Petitioner's class-of-one equal protection claim

#### 1. The Ninth Circuit's decision does not conflict with this Court's case law.

Petitioner contends that the Ninth Circuit failed to apply this Court's equal protection precedent. (Pet. Cert. 10). Apparently, she asserts that the Ninth Circuit's decision conflicts with this Court's decision in *Village of Willowbrook v. Olech*. In *Olech*, this Court, in a brief two-page per curiam decision, held that, in a case that arose out of the village's exercise of its regulatory authority, the equal protection clause could give rise to "a cause of action on behalf of a 'class of one' where the plaintiffs did not allege membership in a class or group." 528 U.S. at 564 (footnote omitted). That terse ruling does not establish that the "class-of-one" theory applies in all contexts, no matter the nature of the government action that is under attack.

Justice Breyer, concurring in *Olech*, noted the concern that the theory "would transform many ordinary violations of city or state law into violations of the Constitution." 528 U.S. at 565. He believed that concern was alleviated in that case because the plaintiffs "had alleged an extra factor as well – a factor that the Court of Appeals called 'vindictive action,' 'illegitimate animus,' or 'ill will.'" *Id.* at 566 (citation omitted). In his view, "the presence of that added factor * * * [wa]s sufficient to minimize any

concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.*

As noted, *Olech* dealt with the village's exercise of its regulatory authority, not with the government's role as an employer. And, as this Court's decisions recognize, that role is a very different one. In fact, it is well settled that ordinary public-employment decisions—those that do not implicate a fundamental right or a suspect classification—are not subject to federal judicial review, even if they are mistaken, unreasonable, or pretextual. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 679 (1994) (plurality opinion) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information"); *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) ("state law, rather than the Federal Constitution, generally governs the substance of the [public] employment relationship"); *Connick v. Myers*, 461 U.S. 138, 143, 147 (1983) ("ordinary dismissals * * * are not subject to judicial review * * * even if the reasons for the dismissal are alleged to be mistaken or unreasonable"); *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (public-employment decisions do not implicate due-process concerns even if a supervisor "deliberately lied" about his reasons for terminating the employee). *See generally Singleton v. Cecil*, 176 F.3d 419, 425-28 (9th Cir.), *cert. denied.*, 528 U.S. 966 (1999) (en banc) (canvassing this Court's jurisprudence relating to judicial review of public-employment decisions).

In *Bishop*, for example, a police officer who had been terminated without a hearing claimed that he had been deprived of a property interest in his employment and the liberty interests to be free from public stigma and pretextual termination. In addressing the officer's second claimed liberty interest—freedom from termination based on false information—this Court concluded that the termination did not implicate a liberty interest even if the supervisor had *deliberately lied* about the reasons for terminating the officer. 426 U.S. at 349 & n. 13. The Court explained that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349. *See also Connick*, 461 U.S. at 146-49 (relying, in part, on *Bishop* to explain why public-employment decisions involving speech on matters of private concern are not subject to federal judicial review). The rationale behind the Court's refusal to review most challenges to public-employer decisionmaking is simple: It reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143.

This limited scope of review also stems from the recognition that the government agency's role as a sovereign enforcer of the law and provider of public services is fundamentally different from its role as an employer. *Waters*, 511 U.S. at 679-80. *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) (noting difference between government action to manage its own internal affairs and action "to regulate or license").

Indeed, as this Court explained in *Waters*, "the government as employer * * * has *far broader powers* than does the government as sovereign." *Waters*, 511 U.S. at 671 (emphasis added). Therefore, a reviewing court should not treat the government's interests as an employer the same way it treats the government's interests as a sovereign. *Id.* at 674-75. "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as an employer." *Id.* at 675. Consequently, even when a public-employment decision implicates protected speech, for example, reviewing courts must take care to assign the government's concerns as an employer "a greater value" and to give the employer's justification for its actions "greater deference." *Id.* at 673, 675.[6]

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[6] This Court has treated government action as an employer differently from government action as a sovereign in other contexts as well. *See, e.g.*, *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987) (plurality opinion) (Fourth Amendment does not require government to procure warrant for every work-related intrusion because that requirement would conflict with common-sense realization that government offices could not function if every employment decision became constitutional matter); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (although government might not be able to prevent private citizens from wearing long hair, it can prevent policemen from doing so); *Gardner v. Broderick*, 392

A close reading of this line of authority reveals the following about constitutional claims raised by public employees: If a public employee's challenge to an adverse employment decision does not implicate a fundamental right or a suspect classification, it is not subject to federal judicial review. Allowing federal review in such ordinary cases would conflict with the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143.[7]

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U.S. 273, 277-78 (1968) (government cannot punish private citizens for refusing to provide government information that may incriminate them, but government employees can be dismissed when incriminating information they refuse to provide relates to performance of their jobs).

[7] Petitioner contends that "every governmental action must be supported by a rational basis," citing *City of Cleburne v. Cleburne Living Center*, 463 U.S. 432, 448-49 (1985). But *Cleburne* deals with a city's decision to deny a permit, and not with any government employee claim of unequal treatment. Petitioner also argues that "this Court has never limited the Fourteenth Amendment's scope as applied to public employment," citing *Washington v. Davis*, 426 U.S. 229 (1976), and *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003). (Pet. Cert. 19). Neither case involves class-of-one analysis. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1960 (2003), also cited by petitioner simply stands for the

Treating decisions the government makes as an employer differently from decisions it makes as a sovereign makes particular sense when applied to the class-of-one theory. Personnel decisions, by their very nature, single out individual employees. Sometimes employees are singled out based on obviously rational differences—*i.e.*, differences in educational background or quality and quantity of work. But oftentimes, they are based on highly subjective value judgments—*e.g.*, perceived levels of assertiveness, maturity, or the ability to work well with or manage others. Indeed, employment decisions might even boil down to a characteristic as esoteric as whether the employee is a good "fit" for the work environment.

As an employer, the government has a strong interest in having the flexibility to decide how best to manage its operations and employees. Judicial oversight of these day-to-day personnel decisions would undermine efficient decisionmaking and would ultimately trivialize the important protections guaranteed by the federal constitution. As one district court judge aptly put it, because "practically every

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proposition that "public employees do not surrender *all* of their First Amendment rights by reason of their employment." (Emphasis added). *Nat'l Treasure Employees Union v. Raab*, 489 U.S. 656, 665 (1989), recognizes that in some circumstances public employees can be subject to search (more specifically, to a urinalysis) without a warrant or individualized suspicion. None of those decisions assists petitioner here.

employee, public or private, is bound to be convinced at some point that he or she is getting the short end of the stick, it is not hard to imagine the bee hive of constitutional litigation that would be generated by this variant of the 'class of one' doctrine." *Campagna v. Commonwealth of Mass.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff'd* 334 F.3d 150 (1st Cir. 2003).

Thus, there is no conflict between the Ninth Circuit's decision that class-of-one theory does not apply in the public employment context and this Court's case law. Instead, the Ninth Circuit's decision is solidly grounded in this Court's jurisprudence.

**2. This case is not as significant as petitioner contends.**

Petitioner repeatedly stresses how significant she believes this case is. According to her, the class-of-one issue is one of "substantial and recurring importance[,]" that can affect "millions of public employees[.]" (Pet. Cert. 2). She also contends that the Ninth Circuit's decision harms state and municipal employees. (Pet. Cert. 22, 24).

But the case is not as important as petitioner indicates. Even when class-of-one equal protection analysis is applied in the public employment context, what is striking is how rarely such claims succeed. That is why the Ninth Circuit called petitioner's case "unique." *Engquist*, 478 F.3d at 994. The panel majority quoted the Seventh Circuit's observation that it was "'not surprised to have found no "class of one" cases in which a public employee has prevailed since the extreme case that kicked off the "class of

one" movement more than two decades ago.'" *Id.*, quoting *Lauth v. McCollum*, 424 F.3d 631, 633-34 (7th Cir. 2005) (citations omitted by Ninth Circuit).[8]

There may be millions of government employees, but the number of successful class-of-one equal protection claims brought by public employees against their employers is almost nil. Thus, even if this Court were to grant certiorari and reverse the decision of the court of appeals, the outcome in very, very few cases would be changed. The universe of public employment may be relatively large, but a tiny section of that universe is directly impacted by this case.

In any event, in arguing that the rights of public employees will be imperiled if the Ninth Circuit's decision stands, petitioner ignores the existence of remedies under state law or collective bargaining agreements. Federal court oversight is not the only remedy available, so the loss, or limitation, of federal court review does not leave public employees without remedy for adverse, impermissible employment actions.[9]

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[8] As the Ninth Circuit also noted, the "extreme case" was *Ciechon v. Chicago*, 686 F.2d 511 (7th Cir. 1982), "where a paramedic was made a scapegoat for conduct that had drawn the wrath of the local media, while her identically situated partner received no disciplinary sanction at all." *Lauth*, 424 F.3d at 634.

[9] In this case, the Ninth Circuit observed that, although petitioner was covered by a collective

### 3. Although a circuit split exists, this Court need not act to resolve the split now.

Petitioner notes that "seven other circuits now permit public employees to state a rational basis equal protection claim against public employers to challenge individual employment decisions." (Pet. Cert. 11, citing *Campagna v. Mass. Dep't. of Envt'l Prot.*, 334 F.3d 150, 156 (1st Cir. 2003); *Neilsen v. D'Angelis*, 409 F.3d 100, 104 (2nd Cir. 2005); *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3rd Cir. 2006); *Whiting v. Univ. of Miss.*, 451 F.3d 339, 348-50 (5th Cir. 2006), *cert. denied* ___ U.S. ___, 127 S. Ct. 1038 (2007); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F,3d 250, 260-61 (6th Cir. 2006); *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005); *Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1148-49 (10th Cir. 2001)). With regard to the class-of-one issue, there is no doubt that there is a split between the Ninth Circuit's decision in this case and the decisions of other circuits. The Ninth Circuit majority acknowledged that fact. *Engquist*, 478 F.3d at 993.

That there is a split does not necessarily mean that the split is worthy of this Court's attention at this time, however. And, at the very least, this Court should defer its consideration of this particular split.

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bargaining agreement, there was nothing to indicate she had challenged her dismissal under that agreement. *Engquist*, 478 F.3d at 995 n. 3.

First, other courts have had little opportunity to respond to and evaluate the Ninth Circuit's decision in this case. Only two published district court opinions have considered whether to follow the Ninth Circuit's approach. *Pina v. Lantz*, 495 F. Supp. 2d 290, 304 (D. Conn. 2007) (noting the circuit split, and finding that "many of the arguments advanced by the Ninth Circuit in *Engquist* have considerable merit," but ultimately not deciding whether to follow *Engquist*); *Hayden v. Alabama Dep't of Public Safety*, 506 F. Supp. 2d 944, 955-57 (M.D. Ala. 2007) (also declining to decide whether to follow *Engquist* approach). In this situation, it may be prudent at least to let the issue percolate for awhile in the lower courts.

In any event, although there is no doubt that the split exists what is notable about the other circuits' decisions, applying the class-of-one theory in the context of public employment actions, is both their lack of analysis – of any careful consideration of whether the theory should apply in this setting – and their sense of unease about the theory in general. That is, the other circuits' decisions apply the class-of-one theory, but they hardly embrace it.

None of the other circuits' decisions cited above contains any thoughtful analysis of whether the class-of-one theory should apply to review government employer decisionmaking. The usual approach is simply to cite *Olech* and then apply the theory. *See, e.g., Hill*, 455 F.3d at 239; *Campagna*, 334 F.3d at 156. That lack of analysis may flow from the fact that the plaintiff almost always is unsuccessful in these

cases. *See Engquist*, 478 F.3d at 994 (making that point, and citing cases for it).

Applying class-of-one analysis in this context has been the subject of some criticism, however. In *Lauth v. McCollum*, 424 F.3d 631 (7th Cir. 2005), the plaintiff, a village police officer, brought suit in federal court after the police chief asked the village's board to sanction the officer for misfeasance (the board obliged). Judge Posner observed that "[t]here is clearly something wrong with a suit of this character coming into federal court dressed as a constitutional case." *Lauth*, 424 F.3d at 632. If class-of-one cases can be brought in federal court, "and any unexplained or unjustified disparity in treatment by public officials is therefore to be deemed a prima facie denial of equal protection, endless vistas of federal liability are opened. Complete equality in enforcement is impossible to achieve; nor can personal motives be purged from all official action[.]" *Lauth*, 424 F.3d at 633, citing *inter alia Olech*.

Thus, although a split exists, it is in some sense a shallow one that, at least on one side, is not the result of thoughtful analysis, but of the assumption that the class-of-one theory applies in the public employment context – an assumption made easier by the fact that the plaintiff almost always loses in any event. And, despite the split, the circuits appear to be unanimous in their wariness about applying class-of-one analysis too broadly and in their recognition of the need to cabin application of the theory, even though they differ about how to reign the theory in. (Pet. Cert. 13-15). In this situation, the split does not warrant

immediate attention from this Court. With the Ninth Circuit's more-thoughtful decision now on the table, at least review should be deferred to let other courts evaluate and react to that decision.

**4. This case is not a good vehicle for review because, even if class-of-one analysis applies, petitioner would lose.**

As defendants argued below, petitioner did not establish that defendants treated other similarly situated employees differently. State action will trigger equal-protection review only if the person invoking equal protection was treated differently from other "similarly situated" persons. *Olech*, 528 U.S. at 564. To prevail on her class-of-one claim, petitioner had to prove that other ODA employees who were like her in all relevant respects were treated differently.

She failed to satisfy that burden with respect to any of the adverse employment actions at issue. Because only one person—Hyatt—was promoted to ESC manager, petitioner could successfully challenge the promotion on a class-of-one theory only if she proved that she and Hyatt were alike in all relevant respects. Petitioner failed to make that showing. As she conceded below, Hyatt was more qualified than her in at least two respects—he was more familiar with the laboratory's standard operating procedures and had experience working as a chemist for the Laboratory Services Division. (E.R. 155, Vol. 2 Tr. 23-26). Because petitioner and Hyatt were not similarly situated, her equal-protection challenge to the promotion decision fails as a matter of law.

Petitioner also failed to prove that defendants treated other similarly situated employees differently during the layoff and bumping processes. Several other ESC employees were laid off and were treated the same way petitioner was treated. To the extent petitioner claims that she was treated differently from ESC employees who were not laid off or who were allowed to bump into other laboratory positions, her claim fails because she did not demonstrate that those employees held similar jobs. *Cf. Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (employees are similarly situated "when they have similar jobs and display similar conduct"). Indeed, no other ODA employee held a job similar to petitioner's because petitioner's position was the *only* Program Technician 1, Food Standards Specialist, position in the entire agency. (E.R. 114, 115).[10] Moreover, unlike other positions in the ESC, most of the work petitioner performed could not be directly billed to a client. (E.R. 241-43; E.R. 306-08).

Assuming, for the sake of argument, that equal-protection guarantees come into play when a public employer treats unequally employees who are identical in all relevant respects, petitioner still failed to prove her claim. Petitioner failed to demonstrate that defendants treated her differently from employees who were like her in all relevant respects.

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[10] It was undisputed below that the only other "Program Technician 1" position in the agency was the "Grants Administrative Officer" position plaintiff attempted to bump. (E.R. 110, 115).

The record, viewed in the light most favorable to petitioner, shows that no other employee was similarly situated. As a result, petitioner's class-of-one claim fails as a matter of law.[11]

Moreover, even if class-of-one analysis applies in this case, ultimately petitioner would lose on grounds of qualified immunity. 42 U.S.C. § 1983 "creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights." *Devereux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Qualified immunity, however, operates to shield section 1983 defendants "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The examination into whether a right was "clearly established" does not proceed at a level of broad and abstract generality, such as the "right to due process of law" or the "right to equal protection." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized,

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[11] In arguing that her case is a good one for this Court to review, petitioner points to the jury's finding that she was treated differently than "others similarly situated." (Pet. Cert. 17). That finding is not supported by any evidence, however.

and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. *See also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (in light of preexisting law, unlawfulness must be apparent).

Here, in late 2001 and early 2002, when defendants made the decisions at issue, the right of a public employee to be free from arbitrary adverse employment decisions under a class-of-one theory was not clearly established under equal-protection jurisprudence. While this Court and the Ninth Circuit had recognized the class-of-one theory in the "regulatory" context for some time,[12] neither this Court nor the circuit has ever held—or even intimated—that such a claim might extend to public-employment decisions. Whether class-of-one rights extend to public-employment decisions was (and is) not clearly established by binding precedent.

The inquiry therefore turns to whether such a right was clearly established in light of decisions from other jurisdictions. Admittedly, a few other circuits had applied that theory in the employment context by late 2001. *See, e.g., Bartell*, 263 F.3d at 1149; *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981). But, the fact that a few jurisdictions had applied class-of-one theory in employment cases by 2001 does not

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[12] *See, e.g., Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 944-48 (9th Cir. 2004), *reh'g denied*, 395 F.3d 1062 (2005) (water regulations).

demonstrate that the theory's application to employment cases was then clearly established law. Instead, it reflects that the law in this area was just beginning to develop. *Cf. Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) (defendants entitled to qualified immunity given lack of "consensus of cases of persuasive authority" from lower courts and "undeveloped state of the law").

Moreover, all of the class-of-one cases decided by late 2001 merely *assumed* that the class-of-one theory applies to public-employment decisions without even discussing whether it properly *should*.[13] And, as explained above, the *Waters-Bishop-Connick* line of authority strongly suggests that this Court, if faced with the question, would decline to apply the class-of-one theory to public-employment decisions. Given the lack of persuasive authority from other jurisdictions, the undeveloped state of the law in 2001, and the likelihood that this Court would conclude that class-of-one theory does not apply in employment cases, defendants could not have been expected to predict that the class-of-one theory would apply to the employment decisions at issue in this case.

Thus, even if this Court were to conclude that defendants violated petitioner's equal-protection rights under a class-of-one theory, it cannot be said that such a right was "clearly established" by late 2001. A government official, familiar with the class-

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[13] The same is true of cases decided since then. *See, e.g., Neilsen*, 409 F.3d at 104-05.

of-one line of authority, reasonably could have believed that the class-of-one theory applied only where the government was acting in its "regulatory" capacity.

These weaknesses in petitioner's case – her failure to prove that defendants treated others similarly situated differently, and the fact that qualified immunity would preclude success on her claim anyway – counsel against grant of a writ in this case. Even if class-of-one analysis applies, ultimately petitioner's claim will fail. That inevitable outcome lessens the need to grant review in this case.

**B. Petitioner's claim that the State's split-recovery statute, which allocates a punitive damages award between a plaintiff and a state fund, effects a taking of her property.**

As noted, the Ninth Circuit panel unanimously concluded that the State's split-recovery statute, Or. Rev. Stat. § 31.735, which provides that the Criminal Injuries Compensation Account is entitled to 60 percent of punitive damages awarded in a verdict, does not effect a taking of petitioner's property. The statute provides that "[u]pon entry of a verdict including an award of punitive damages," the state Department of Justice becomes a judgment creditor as to the punitive damages portion of the award, to which the Criminal Injuries Compensation A count is entitled, with forty percent to be paid to the

prevailing party and sixty percent to be paid to the state account. Or. Rev. Stat. § 31.735(1).[14]

Petitioner contends that the Ninth Circuit erred in holding that this statute does not, within the meaning of the Fifth Amendment takings clause, effect a taking of her property. According to her, there is a "split within the state courts as to whether 'split recovery' punitive damages statutes are constitutional." (Pet. Cert. 24).

In fact, there is no such split. Although two state supreme courts have found that those States' split recovery statutes effect a taking, those statutes are significantly different from Oregon's. What is significant about Oregon's statute is that the State's interest arises upon "entry of a verdict." Or. Rev. Stat. § 31.735(1). That is what distinguishes this case from the Utah and Colorado cases that petitioner contends create a split. (Pet. Cert. 25). In *Smith v. Price Development Co.*, 125 P.3d 945, 950 (Utah S.C. 2005), the State's interest in the punitive damages arose only when the judgment was paid. The court found it significant that the statute did not make the state a judgment creditor. *Id.* The Oregon statute specifically makes the state DOJ a judgment creditor. Or. Rev. Stat. § 31.735(1). Similarly, in *Kirk v. The Denver Publishing Co.*, 818 P.2d 262, 266 (Colo. S.C. 1991), the State had no interest in the punitive damages until after the judgment was paid to the

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[14] The statute is set out in the appendix to the cert petition. (Pet. Cert., App. vol. 2 at 72-74).

plaintiff. That fact was the basis of the court's decision that the punitive damages had been taken. *Id.* at 272.

In contrast to those two state court decisions, when courts have considered statutes more in line with Oregon's, they have been upheld against takings claims. *Cheatham v. Pohle*, 789 N.E.2d 467, 471-75 (Ind. S.C. 2003); *Evans v. State*, 56 P.3d 1046, 1058 (Alak. S.C. 2002); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 639 (1993); *Gorden v. State*, 608 So.2d 800, 801-02 (Fla. S.C. 1992), *cert. denied* 507 U.S. 1005 (1993); *Shepherd Components, Inc. v. Petrides*, 473 N.W.2d 612, 619 (Iowa S.C. 1991).

In sum, there is no true split amongst the decisions of the state supreme courts. Instead, there is simply a significant difference between some of the States' split recovery statutes.

Property interests "'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law* * * *.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added). Petitioner has a difficult time trying to identify the "independent source" of law that she claims creates her supposed property interest in punitive damages to which she never is entitled as a matter of state law. She tries rhetoric. (*e.g.*, Pet. Cert. 3 – state statute "confiscates" portion of punitive damages award; such statutes effect millions of dollars "of wealth transfer"). But her

own rhetoric hardly amounts to an independent source of law. She cites Oregon court decisions for the unexceptional principle that her "legal interest in the punitive damages award is incident to her cause of action for intentional interference with contract." (Pet. Cert. 28). But she ignores the Oregon Supreme Court's decision in *DeMendoza v. Huffman*, 334 Or. 425, 449,51 P.3d 1232 (2002), holding, as a matter of state law, that "before entry of final judgment, a plaintiff in Oregon has, at most, an expectation of such an award" of punitive damages, and that "[a] vested right must be something more than a mere expectation based upon the anticipated continuance of existing law[.]" (citation and internal quotation marks omitted). In *DeMendoza*, the state court rejected a state constitutional takings challenge to the split recovery statute because in Oregon a plaintiff has no property interest in punitive damages until entry of final judgment.

Petitioner also contends that the Ninth Circuit's decision is contrary to this Court's recent case law, citing *Philip Morris v. Williams*, 549 U.S. ___, 166 L. Ed. 2d 940 (2007), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). That is so, petitioner claims, because in *Philip Morris*, "this Court held that the 'amount' of punitive awards must be based solely on actual or potential harm to the plaintiff." (Pet. Cert. 30, citing *Philip Morris*, 166 L. Ed. 2d at 948). And because in *BMW*, this Court "mandated that lower courts assure that punitive damages awards are not grossly excessive based in part upon a mathematical comparison of the amount of punitive damages with the actual or potential harm to the

plaintiff." (Pet. Cert. 30, citing *BMW.*, 517 U.S. at 575).

But neither *Philip Morris* nor *BMW* repudiates the traditional rationales for punitive damages, which are to punish past misconduct and to deter future injurious conduct by the defendant and others. In *BMW*, this Court affirmed that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." 517 U.S. at 568. *See also Philip Morris*, at 1062 (same). While punitive damages cannot be used directly to punish a defendant for harms to non-parties, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible[.]" *Id.* at 1064. *Philip Morris* and *BMW* did not change the law in any way that impacts this case. Moreover, in *BMW*, this Court reaffirmed that "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." 517 U.S. at 568. *See also Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 39 (1990) (Scalia, J., concurring) ("State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages").

Petitioner argues that she "should" be entitled to the entire award of punitive damages. (Pet. Cert. 31). But her opinion on that matter does not establish that a taking has occurred. She also contends that

"the 'split recovery' statute distorts the civil litigation process." (Pet. Cert. 32). She intimates that the "State's financial interest in punitive damages conflicts with the individual defendants[']interest in avoiding a judgment entered against them." (Pet. Cert. 32). But the fund into which the punitive damages are placed is used to compensate crime victims and their families and to offer grants to eligible public or private victim assistance programs. *See generally* Or. Rev. Stat. §§ 147.015, 147.035, 147.227, and 147.231. Nothing in the enumerated statutes allows the State or the state DOJ to retain any of the funds *for its own benefit*. Indeed, by statute, DOJ is prohibited even from charging fees to those who apply for funds under the program. Or. Rev. Stat. § 147.315.

Nor does the allocation of punitive damages to the fund create a conflict among DOJ's "clients." The ODA does not benefit from the allocation of the punitive-damage award to the crime-victims account any more than plaintiff does. And the individual defendants are not harmed by this allocation. Providing that a portion of the punitive-damage award must be allocated to the crime-victims fund merely indicates that, *if* punitive damages are imposed, they must be distributed in accordance with state law.

In sum, there is no reason for this Court to grant certiorari to review petitioner's claim that the State's split recovery statute effects a taking of her property. There is no conflict amongst the decisions of the state supreme courts; as a matter of state law, she has no

property interest in punitive damages that are awarded to the crime-victims fund upon entry of the verdict; and the Ninth Circuit's decision does not conflict with any decision of this Court.

## CONCLUSION

For the reasons given above, this Court should not issue a writ of certiorari in this case.

Respectfully submitted,

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December 6, 2007

# REPLY BRIEF

77

No. 07-474

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

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ANUP ENGQUIST,

*Petitioner*

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents*

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On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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# PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## I. Introduction

Respondents concede the significant split among the Circuits regarding the first question presented–whether this Court's traditional equal protection "rational basis" analysis in Village of Willowbrook v Olech, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000), applies to public employment decisions. And despite Respondents' protestations to the contrary, the issue's maturity and importance are amply demonstrated by the fact that no less than eight Circuits have been forced to address the issue in the seven years that have elapsed since the Olech ruling. Accordingly, the Court should grant review of the first question presented.

With respect to the second question presented–the constitutionality of a state "split recovery" punitive damages statute – Respondents are wholly unable to reconcile the conflict between the Ninth Circuit decision below and this Court's decision in Phillips v Washington Legal Foundation, 524 US 156, 118 S Ct 1925, 141 L Ed 2d 174 (1998), in which this Court defined the test for determining what constitutes "property" protected under the Takings Clause. Indeed, while the Phillips analysis is controlling on the punitive damage takings issue, see Pet. at 27, Respondents fail to discuss or even cite the Phillips decision anywhere in their Brief in Opposition. It is therefore appropriate for the Court to grant review of the second question presented as well.

## II. Reply to Respondents' Statement of Facts

Respondents recount their own version of the facts, drawing all inferences in their favor, ignoring contrary evidence, and raising evidentiary theories that the jury rejected and Defendants failed to preserve, all contrary to well-established rules of appellate review.[1] The Petition and the Ninth Circuit opinion adequately and correctly recite the facts that frame the two important questions presented.

## III. The Lower Courts Need This Court's Immediate Guidance Regarding Olech's Application To Public Employment Decisions

Respondents concede there is a split among the circuits as to whether rational basis Equal Protection analysis applies to individual public employment decisions. Br. in Opp. at 24. Nevertheless, Respondents argue, this Court should deny review because the Ninth Circuit's majority panel decision is consistent with Olech; the issue should be left to further "percolate" in the lower courts; the circuit conflict is a shallow one; the questions presented are

---

[1]For example, Respondents admitted on appeal that the evidence at trial was sufficient to prove Respondents' insidious plan to eliminate Petitioner as an employee. Pet for Cert at 18. And Respondents failed to challenge the sufficiency of the evidence with respect to the following jury findings: (1) there was no rational basis for Respondents' actions toward Petitioner; (2) Respondents' actions toward Petitioner were arbitrary, malicious or vindictive; and (3) Respondents' actions caused the denial of promotion, the loss of bumping rights, and/or Petitioner's termination.

unimportant; and Petitioner will lose anyway. Each of these arguments is demonstrably incorrect.

First, Respondents concede that those Circuits applying rational basis Equal Protection analysis to individual public employment decisions do so in reliance upon this Court's decision in Olech. Br. in Opp. at 25-26. The need for this Court's immediate review is precisely because seven read Olech as applying to public employment decisions, and the Ninth Circuit does not.

Second, there is no need for this legal issue to further "percolate" in the lower courts. No less than eight Circuits have already addressed the issue, and, given the uniform practice of the Circuits not to overrule a published decision without an en banc hearing, it is unrealistic to think other Circuits will change their position now that the Ninth Circuit has issued a contrary ruling.

Third, there is no benefit to allowing the circuit conflict to simmer in the lower courts. The Circuits have already articulated at least three alternative methods for circumscribing rational basis Equal Protection claims to address the same concerns (federal court dockets flooded with Equal Protection claims and federal judges reviewing every individual public official decision) that caused the majority panel to rule Olech does not apply to the public employment setting. Pet. at 13-16. Respondents fail to articulate what more needs to be accomplished in the circuit and district courts to prepare the legal issue for this Court's review.

Fourth, the Circuit conflict is not shallow. The body of Equal Protection law in many of these Circuits has developed to the point where there are numerous appellate decisions applying Equal Protection rational basis analysis in the public employment setting, spanning periods of almost 20 years. See, e.g., Stachowski v Town of Cicero, 425 F3d 1075 (7th Cir 2005); Doubet v Eckelberg, 81 Fed Appx 59 (7th Cir 2003); Hedrich v Bd. Of Regents of Univ of Wisconsin System, 274 F3d 1174 (7th Cir 2001); Levenstein v Salafsky, 164 F3d 345 (7th Cir 1998); Ciechon v City of Chicago, 686 F 2d 511, 523 (7th Cir 1982); Whiting v University of Southern Mississippi, 451 F3d 339, 348 (5th Cir 2006); Shipp v McMahon, 234 F3d 907 (5th Cir 2000); Zeigler v Jackson, 638 F 2d 776 (5th Cir 1981); Neilson v D'Angelis, 409 F3d 100, 104 (2d Cir 2005); Giordano v City of New York, 274 F3d 740, 751 (2d Cir 2001); *Cobb v Pozzi*, 352 F3d 79, 99 (2d Cir 2003) amended, 363 F3d 89, 110 (2nd Cir 2004); Diesel v Town of Lewisboro, 232 F3d 92, 103 (2nd Cir 2000); see also, LeClair v Saunders, 627 F2d 606, 609-610 (2d Cir 1980). The Circuit split is not shallow, lacking in analysis, or likely to change.

Fifth, wholly aside from the millions of public employees affected by this issue, Pet. at 24 & n.2, the issue presented is of significant public importance. If the Ninth Circuit panel majority is correct, then public employers in seven other Circuits will spend years defending Equal Protection rational basis claims with no legal basis, wasting substantial taxpayer funds and public employer time. If the Ninth Circuit majority panel is wrong, then public employees throughout the largest circuit court in the country are denied access to

the federal courts for redress of their Constitutional rights.

Finally, if this Court grants review and vindicates Petitioner's view of the Equal Protection Clause, Petitioner will prevail, not lose. Both the jury and the trial judge have already rejected Respondents' argument that Petitioner failed to show she was treated differently than other similarly situated employees, and that is a result the Ninth Circuit did not disturb on appeal. Engquist v Oregon Dep't of Agric, 478 F3d 985, 1014 n 3 (9th Cir 2007). As for Respondents' qualified immunity argument, the trial judge and the majority of the circuit and district courts addressing the question have rejected qualified immunity challenges to Olech claims. See, e.g., Cobb v Pozzi, 363 F3d 89, 112 (2nd Cir 2004); Levenstein v Salafsky, 164 F3d 345, 353 (7th Cir 1998); Miller v Ojima, 354 F Supp 2d 220 (EDNY 2005); Yates v Beck, 2003 US Dist Lexis 16969 (WD N Car 2003); Olech v Village of Willowbrook, 2002 US Dist Lexis 19577 (ND Ill 2003).

Accordingly, this Court should grant review of whether Equal Protection rational basis analysis applies to individual public employment decisions.

## IV. This Court Should Resolve The Split Among State Courts Concerning Whether "Split Recovery" Punitive Damages Statutes Violate the Takings Clause

Respondents deny the State courts are divided over whether split recovery punitive damages statutes effect an unconstitutional taking of property; contend

that Petitioner has no property interest in punitive damages awarded to the State after entry of a verdict in her favor and argue there is no conflict between Ninth Circuit's decision in this case and any decision of this Court. As a result, Respondents say this Court should decline review of Oregon's split recovery punitive damages statute.

Respondents admit that the controlling question in this case as in the state court cases is what legal interests constitutes "property" cognizable under the takings clause. Resp Br at 34-35. See, Engquist, *supra*, 478 F3d at 1002 ("If the punitive damages award does constitute property, it is a "taking" to confiscate 60 percent of it, such that the second prong almost certainly would be satisfied.")

Respondents are incorrect when they claim the State courts are not divided over the controlling issue - what constitutes property for purposes of the takings clause. Respondents contend there is a significant difference between the Utah and Colorado split recovery punitive damages statutes held unconstitutional and the split recovery punitive damages statutes in Oregon and other states which have passed state court constitutional takings challenges. The difference, Respondents argue, is that Oregon's statute gives Oregon its' interest upon entry of the verdict while Colorado and Utah's statute created the States' interest in the proceeds after entry of a judgment.

However, Respondents ignore the legal analysis of what constitutes "property" supporting the Colorado Supreme Court's decision in Kirk v Denver Pub. Co,

818 P2d 262, 266 (Col 1991). In Kirk, the Colorado Supreme Court held that a state law forcing a judgment creditor to pay the state general fund one-third of a judgment for exemplary damages to fund state services without conferring a benefit not furnished to other civil litigants violated the takings clause. The Colorado Supreme Court's holding that a judgment for exemplary damages is "property" was premised upon a finding that the underlying tort right of action is a legal interest constituting property:

> "The concept of property, therefore, encompasses those enforceable contractual rights that traditionally have been recognized as choses in action ...(cite omitted)...Because the term 'property' includes a 'legal right to damages for an injury,'...(cite omitted)...it necessarily follows that the term 'property' also includes the judgment itself."

Kirk, *supra*, 818 P2d at 267.

It is on this question, whether a right of action for punitive damages is a legal interest constituting property, that the Colorado Supreme, the Ninth Circuit and the other state supreme courts differ:

> "Our conclusion is bolstered by our consideration of the deterrence and punishment justifications for punitive awards, discussed below, and is in concert with the majority of state supreme courts who have decided the issue."

Engquist, *supra*, 478 F3d at 1002.

While Respondents argue that the Ninth Circuit's decision in this case does not conflict with this Court's decisions, quite the contrary is true. As pointed out in the Petition for Certiorari, Logan v Zimmerman Brush Co., 455 US 422, 102 S Ct 1148, 71 L Ed 2d 265 (1982) and Mullane v Central Hanover Trust Co., 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 (1949) both stand for the proposition that the owner of a tort cause of action maintains a property interest cognizable under the constitution. Moreover, Respondents are wholly unable to reconcile the conflict between the Ninth Circuit's decision below and this Court's decision in Phillips v Washington Legal Foundation, 524 US 156 (1998).

Respondents fail to discuss or even cite Phillips Logan, or Mullane anywhere in their Brief in Opposition. Under Phillips, regardless of whether Engquist had a constitutionally cognizable interest in the *anticipated* generation of punitive damages, any damages the jury *actually* awarded immediately attach as a property right incident to Engquist's ownership of the underlying right of action.

This Court should grant review of Oregon's split recovery punitive damages statute.

## V. Conclusion

For the reasons above stated and those previously advanced, the petition for writ of certiorari should be granted.

Respectfully submitted,

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# JOINT APPENDIX

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76pgs

No. 07-474

FILED
FEB 20 2008
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SUPREME COURT, U.S.

# In the Supreme Court of the United States

**ANUP ENGQUIST,**

*Petitioner,*

*v.*

**OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,**

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## JOINT APPENDIX

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**Petition for writ of certiorari filed October 5, 2007.**
**Certiorari granted January 11, 2008.**

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**United States District Court**
**District Court of Oregon (Portland)**
**Relevant Docket Entries**

CIVIL DOCKET FOR CASE #: 3:02-CV-01637

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Anup Engquist v. Oregon Department of Agriculture et al
Assigned to: Magistrate Judge Donald C. Ashmanskas

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Date Filed: 12/04/2002
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

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| | |
|---|---|
| 12/04/02 | Complaint filed. |
| 01/16/03 | Answer filed. |
| 10/16/03 | Defendants' motion for summary judgment and supporting memorandum filed. |
| 01/12/04 | Consent to a magistrate. |
| 02/25/04 | Plaintiff's memorandum in opposition to Defendant's motion filed. |
| 03/19/04 | Defendants' reply memorandum in support of motion filed. |

| | |
|---|---|
| 04/09/04 | Opinion and order granting in part and denying in part Defendants' motion for summary judgment. |
| 08/16/04 | Defendants' motion for partial summary judgment and supporting memorandum filed. |
| 08/24/04 | Plaintiff's memorandum in opposition to Defendants' motion filed. |
| 09/07/04 | Defendants' reply memorandum in support of motion filed. |
| 09/15/04 | Order and opinion denying motion. |
| 10/4/04 | Motion *in limine* to bar evidence concerning class of one Equal Protection claim and supporting memorandum filed. |
| 10/15/04 | Minute order conditionally granting *in limine* motion. |
| 11/01/04 | Jury trial begins. |
| 11/18/04 | Jury trial completed. |
| 11/18/04 | Jury verdict. |
| 11/22/04 | Motion for judgment NOV and supporting memo filed. |
| 1/19/05 | Minute Order denying motion for judgment NOV. |
| 02/04/05 | Judgment entered. |

| | |
|---|---|
| 02/11/05 | Defendants' Notice of Appeal filed. (9th Cir. No. 05-35170.) |
| 02/28/05 | Plaintiff's Notice of Appeal filed. (9th Cir. No. 05-35263.) |
| 04/07/05 | Defendants' Amended Notice of Appeal filed. (9th Cir. No. 05-35170.) |

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**United States Court of Appeals for the Ninth Circuit**
**Relevant Docket Entries**[1]

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| | |
|---|---|
| 03/01/05 | Appeal docketed. |
| 08/22/05 | Brief for Defendants-Appellants filed. |
| 10/24/05 | Order granting Defendants-Appellants' motion to withdraw Oregon Department of Agriculture as an appellant. |
| 12/05/05 | Brief for Plaintiff-Appellee filed. |
| 01/27/06 | Reply brief for Defendants-Appellants filed. |

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[1] Petitioner cross-appealed aspects of the District Court's decision, *Engquist*, Plaintiff-Appellant, v. *Oregon Dep't of Agric., et al.*, Defendants-Appellees, No. 05-35263. The Ninth Circuit docket entries above have been simplified to refer only to the appeal in No. 05-35170.

| | |
|---|---|
| 07/27/06 | Oral Argument. |
| 02/08/07 | Opinion issued. |
| 03/02/07 | Plaintiff-Appellant's petition for rehearing and rehearing *en banc* in cross-appeal filed. |
| 07/12/08 | Panel and *en banc* rehearing denied. |

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

ANUP ENGQUIST,

Plaintiff,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOHN SZCZEPANSKI, and JOSEPH (JEFF) HYATT,

Defendants.

CV. 02-1637-AS

COMPLAINT FOR CIVIL RIGHTS VIOLATION

JURY TRIAL DEMAND

---

## I. JURISDICTION

1. This court maintains jurisdiction of plaintiff's Title VII claims for discrimination due to race, color, sex and national origin under 42 USC § 2000e-5(f)(3).

2. This court maintains jurisdiction of plaintiff's claims for violation of 42 USC §1981 and 42 USC §1983 under 28 USC §1343(3) and (4).

3. This court maintains jurisdiction of plaintiff's federal claims under 28 USC § 1331.

4. This court maintains jurisdiction of plaintiff's common law claims pursuant to 28 USC §1367.

## II. PARTIES

5. Plaintiff is an Asian woman whose national origin is Indian.

6. Defendant, the Oregon Department of Agriculture, is a department of the State of Oregon. The Department of Agriculture employs more than 15 employees in the State of Oregon.

7. Defendant John Szczepanski was at times material to the complaint the Assistant Director of the Oregon Department of Agriculture. Defendant Joseph Hyatt was at times material to the complaint the Export Service Center Manager of the Oregon Department of Agriculture. Defendants Szczepanski and Hyatt are sued in their individual and representative capacities.

## III. FACTS

8. Plaintiff commenced employment with defendant, the Oregon Department of Agriculture, in December 1992. At the time of her termination, the plaintiff was employed as a Food Standards Specialist/Program Technician I. The plaintiff was a permanent employee who could only be terminated for cause.

9. During the course of the plaintiff's employment, defendant Hyatt subjected the plaintiff to harassment because of her race, color, sex, national origin and/or for arbitrary, malicious and vindictive reasons. Defendant Joseph (Jeff) Hyatt made unwelcome sexual comments and innuendos, monitored the plaintiff's activities, rummaged through the plaintiff's desk, read the plaintiff's day planner, read the plaintiff's e-mail, changed the

plaintiff's work location and moved her to a location in a dusty corner, and made false, derogatory and defamatory statements about the plaintiff to other employees.

10. The plaintiff objected to defendant Hyatt's harassment and notified him of her objections. Subsequently, defendant Hyatt began subjecting the plaintiff to retaliation for her opposition to his unlawful employment practices.

11. In September 2001, defendant Oregon Department of Agriculture opened a position for an Export Service Center Manager. The plaintiff applied for, was qualified for and was denied appointment as the Export Service Center Manager. Defendant Oregon Department of Agriculture and Szczepanski selected a less qualified white male, Mr. Hyatt, to fill the Export Service Center Manager position.

12. Subsequent to Mr. Hyatt's promotion to Export Service Center Manager, defendants Hyatt and Szczepanski removed plaintiff's duties and did so in an effort to justify plaintiff's termination in an impending reduction in force.

13. In January 2002, defendants notified plaintiff that her position was being eliminated as a part of a reduction in force. Subsequent to the elimination of the plaintiff's position, defendants interfered with the plaintiff's exercise of the plaintiff's bumping rights in an effort to cause the plaintiff's termination. Defendants failed to provide the plaintiff notice of positions for which she was qualified and denied the plaintiff's request to bump into positions which she was qualified. As a result of

defendant's elimination of the plaintiff's position and denial of bumping rights, the plaintiff's employment was terminated in February 2002.

14. The plaintiff made complaints to the defendant, Oregon Department of Agriculture concerning the harassment and discrimination alleged herein. Defendant, Oregon Department of Agriculture failed and/or refused to initiate prompt disciplinary action reasonably calculated to end the harassment and ratified the acts of harassment and discrimination.

15. Each of the defendant's actions referenced above were taken because of the plaintiff's race, color, sex, national origin and for arbitrary, vindictive, malicious reasons.

16. As a result of the defendants' acts, the plaintiff has suffered lost wages, fringe benefits and prejudgment interest in an amount to be determined at trial. The plaintiff is entitled to injunctive relief reinstating her employment or, in the alternative, an award of lost future wages and fringe benefits in an amount to be determined at trial.

17. As a result of the defendants' acts, the plaintiff has suffered emotional distress in an amount to be determined at trial.

18. Defendants' Hyatt and Szczepanski's conduct was in wilful disregard of the plaintiff's employment rights. The plaintiff is entitled to an award of punitive damages in an amount to be determined at trial against the individual defendants.

19. This complaint was filed within 90 days of the issuance of a notice of private right to sue from the

Oregon Bureau of Labor and Industries and within 90 days of a private right of action notice from the Equal Employment Opportunity Commission.

20. The plaintiff provided a Tort Claim Notice to the Oregon Attorney General within 180 days of the occurrence of her legal injuries referenced above.

## IV. CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

### (Title VII of the Civil Rights Act-Harassment and Discrimination)

21. The plaintiff incorporates by reference paragraphs 1-20 above as if fully set forth herein.

22. Defendant Oregon Department of Agriculture subjected the plaintiff to harassment, denied plaintiff promotion, deprived the plaintiff of bumping rights and terminated the plaintiff's employment because of her race, color, sex and/or national origin in violation of 42 USC §2000e-2(a) of the Civil Rights Act of 1964.

### SECOND CLAIM FOR RELIEF

### (Title VII of the Civil Rights Act-Retaliation)

23. The plaintiff incorporates by reference paragraphs 1-20 above as if fully set forth herein.

24. Defendant Oregon Department of Agriculture subjected the plaintiff to retaliation because of her opposition to unlawful employment practices in violation of 42 USC §2000e-3(a) of the Civil Rights Act of 1964.

## THIRD CLAIM FOR RELIEF

## (Deprivation of Right to Equal Protection)

25. The plaintiff incorporates by reference paragraphs 1-20 above as if fully set forth herein.

26. Defendants Hyatt and Szczepanski subjected plaintiff to harassment, denied plaintiff promotion, deprived plaintiff of bumping rights and terminated plaintiff's employment because of her race, color, sex, national origin and/or for arbitrary, vindictive and malicious reasons in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

27. Defendants actions were intentional, were taken under color of state law and deprived plaintiff of her Constitutional rights in violation of 42 USC § 1983.

## FOURTH CLAIM FOR RELIEF

## (42 USC §1981)

28. The plaintiff incorporates by reference paragraphs 1-20 above as if fully set forth herein.

29. Defendants Hyatt and Szczepanski, under color of state law, intentionally impaired plaintiff's right to enter into and enforce contracts, subjected plaintiff to unequal benefits and disparate punishment because of plaintiff's race, sex, color and/or national origin in violation of 42 USC § 1981.

30. The Oregon Department of Agriculture is liable for the individual defendants' conduct because the plaintiff's injury was the result of a custom, policy or practice of the Oregon Department of Agriculture.

## FIFTH CLAIM FOR RELIEF

### (Due Process Violation)

31. The plaintiff incorporates by reference paragraphs 1-20 above as if fully set forth herein.

32. Defendants Hyatt and Szczepanski violated plaintiff's substantive and procedural due process rights in connection with the deprivation of her property interest in her employment.

33. Defendants Hyatt and Szczepanski's actions were intentional and were taken under color of state law in violation of 42 USC § 1983.

## SIXTH CLAIM FOR RELIEF

### (Intentional Interference with Contract)

34. The plaintiff incorporates by reference paragraphs 1-20 above as if fully set forth herein.

35. Defendants Hyatt and Szczepanski intentionally interfered with plaintiff's employment relationship with the Oregon Department of Agriculture for an improper purpose or using improper means.

36. Defendants' actions were outside their scope of their employment.

**WHEREFORE**, plaintiff demands trial by jury and requests this court grant the following relief:

1. An award of lost wages, fringe benefits and prejudgment interest in an amount to be determined at trial; an order reinstating plaintiff's employment or, in the alternative an award of lost future wages and fringe benefits in an amount to be determined at trial.

2. An award of compensatory damages for emotional distress in an amount to be determined at trial.

3. An award of punitive damages against the individual defendants in an amount to be determined at trial.

4. An award of costs, reasonable attorneys fees and all other fit and proper relief.

DATED this 4th day of December, 2002.

/s/
STEPHEN L. BRISCHETTO
OSB #78156
(503) 223-5814
Attorney for Plaintiff

The plaintiff hereby requests trial by jury.

/s/
STEPHEN L. BRISCHETTO
OSB #78156
(503) 223-5814
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANUP ENGQUIST,

Plaintiff,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOHN SZCZEPANSKI, and JOSEPH (JEFF) HYATT,

Defendants.

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Civil No. 02-1637-AS

OPINION AND ORDER

April 8, 2004

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ASHMANSKAS, Magistrate Judge:

Plaintiff Anup Engquist filed this action in December 2002, alleging employment discrimination against her former employer, the Oregon Department of Agriculture ("ODA"). Plaintiff is a woman whose national origin is India. Defendant John Szczepanski ("Szczepanski") was the Assistant Director of the ODA during plaintiff's employment. Defendant Joseph Hyatt ("Hyatt") was the Manager of the Export Service Center ("ESC"), a subdivision of the ODA during plaintiff's employment. Defendants

Szczepanski and Hyatt are being sued in their individual and official capacities.

Plaintiff worked for the ESC from December 1992 until February 2002. At the time of her termination, plaintiff was a Food Standards Specialist/Program Technician I. Plaintiff alleges that during the course of her employment, Hyatt and Szczepanski subjected plaintiff to harassment because of her race, color, sex, and national origin.

Plaintiff asserts six claims for relief in the complaint: (1) violations of Title VII of the Civil Rights Act for harassment and discrimination; (2) violations of Title VII of the Civil Rights Act for retaliation; (3) violations of the Equal Protection Clause of the Fourteenth Amendment; (4) violations of 42 U.S.C. § 1981; (5) violations of the Due Process Clause of the Fourteenth Amendment; and (6) intentional interference with contract.

Defendants seek summary judgment and argue that there is no evidence supporting plaintiff's assertions. They contend that plaintiff's termination was a business decision unrelated to discrimination. Defendants further argue that the alleged harassment was not sufficiently severe or pervasive so as to alter plaintiff's working conditions.

Oral argument was heard on April 5, 2004. For the following reasons, defendants' Motion for Summary Judgment is granted in part and denied in part.

## PRELIMINARY PROCEDURAL MATTER

Defendants filed a Motion to Strike portions of plaintiff's affidavits in response to defendants'

Motion for Summary Judgment. To the extent that the court considered any of the material that is the subject of defendants' Motion to Strike, it is not outcome determinative. Accordingly, defendants' Motion to Strike is denied as moot.

## STANDARDS

A party is entitled to summary judgment as a matter of law if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991).

The moving party carries the initial burden of proof. The party meets this burden by identifying portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the initial burden is satisfied, the burden shifts to the nonmoving party to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Id.*

The court must view the evidence in the light most favorable to the non-moving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences

may be drawn, summary judgment is inappropriate. *Sankovich v. Ins. Co. Of N. Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

Deference to the non-moving party does have some limit. The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Self-serving affidavits will not establish a genuine issue of material fact if they fail to state facts based on personal knowledge or are too conclusory. *Rodriguez v. Airborne Express*, 265 F.3d 890, 902 (9th Cir. 2001). The "mere existence of a scintilla of evidence in support of the [non-moving party's] position would be insufficient." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). Therefore, where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Ninth Circuit has reiterated that a high standard exists for granting of summary judgment in employment discrimination cases. *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (holding that courts should require very little evidence to survive summary judgment in a discrimination case, because the ultimate question is one that can be resolved only through a searching inquiry—one that is most appropriately conducted by the fact-finder, upon a full record) (citations omitted); *see also Lam v. University of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)). Also, trial courts should act with caution in granting summary judgment and

may deny summary judgment "in a case where there is reason to believe the better course of action would be to proceed to a full trial." *Anderson*, 477 U.S. at 255.

**FACTUAL BACKGROUND**

The following facts are derived from the parties' Concise Statements of Material Facts and accompanying affidavits. Plaintiff worked for the ODA in December 1992 until she was terminated in February 2002. Her job duties included generating business for the ESC, consulting with customers, researching import regulations, training exporters, and creating food safety training programs.

During the period of plaintiff's employment, Norma Corristan ("Corristan") was employed as the Administrator of the Laboratory Services Division at the ODA and supervised the ESC. In 1999, a managerial position at the ESC opened up. The position remained open for over a year. During the time the position was vacant, plaintiff performed some of the duties of the position along with Corristan and another employee.

Hyatt was transferred to a different division within the ODA in February 2000. Prior to his departure, Hyatt informed Corristan that he had concerns that plaintiff was working an insufficient amount of time for her position. Corristan analyzed plaintiff's work hours and concluded that Hyatt's criticisms were unfounded.

In 2001, Corristan received complaints from employees regarding Hyatt's treatment of women and minorities. Corristan ordered Hyatt to attend diversity training and either a conflict resolution or

anger management class. Plaintiff complained to Corristan that Hyatt was harassing her at work by tampering with her computer and making inappropriate sexual comments. Corristan met with Hyatt and told him of plaintiff's complaints.

In July 2001, Szczepanski met with the ESC staff to discuss the vacant managerial position. The staff recommended that the new ESC Manager have at least a master's degree in a laboratory science. However, when the job announcement for the ESC Manager position was posted, the master's degree requirement was omitted from the list of qualifications. There were three applicants for the position of ESC Manager: plaintiff, Hyatt, and a female employee, Karla Sangrey ("Sangrey"). Hyatt was chosen for the position. Corristan believed that Hyatt was less qualified than plaintiff for the position. Plaintiff had two master's degrees in laboratory sciences. Hyatt had a bachelor's degree in biology. Defendants assert that Hyatt was selected because he had background work as a chemist in the ESC, and relevant management, customer service, and budgeting experience. Defendants also believed that Hyatt understood the technical needs of the department better than plaintiff. Hyatt had managed a business similar in size to the ESC and an annual budget in excess of one million dollars. During the interviews, the panel asked each candidate five of the six agreed-upon questions. The unasked question sought information about the candidates' involvement with foreign officials in improving standards and policies. Plaintiff believes she was better qualified than Hyatt regarding this issue.

Later in July 2001, Szczepanski informed Corristan that he was phasing out Corristan's responsibilities over the ESC. In September 2001, Hyatt sent Szczepanski a proposed draft letter recommending that Szczepanski consider a personnel cut in the ESC, remove plaintiff's responsibilities, and place plaintiff under Szczepanski's supervision. Shortly thereafter, Szczepanski relieved Corristan of her supervisory responsibilities over the ESC and plaintiff began reporting to Szczepanski.

Sangrey had a conversation with Hyatt in the fall of 2001. Hyatt told Sangrey that he was creating a personnel plan for the ESC and was "working on getting rid of [Corristan] and [plaintiff]." A few months later, plaintiff's position was eliminated.

In October 2001, Oregon State Governor John Kitzhaber sent an e-mail to agency directors requesting them to prepare an Administrative Cost Reduction Plan. Reductions of ten percent from the General Fund and Lottery Fund budgeted for 2001-03 and ten percent from the 2003-05 budget were sought. In November 2001, the ESC, which did not receive General Fund dollars, was operating at a loss. Corristan was terminated on December 11, 2001. Defendants informed Corristan that she was being terminated because of reorganization and budget cuts.

The Oregon Legislature acted on Governor Kitzhaber's proposed budget cuts in February 2002. The only two employees holding permanent positions in the ODA who were terminated due to budget cuts were Corristan and plaintiff. Plaintiff is an Asian female. Corristan is a Hispanic female.

Once Hyatt became ESC Manager, he sent an e-mail to plaintiff, notifying her that he was changing the location of her office, limiting her work to updating food regulations, and that it was no longer necessary for her to travel. By limiting plaintiff to updating food regulations, there was not enough work to justify a full-time position. Hyatt also told a co-employee that plaintiff had falsified her time records.

In November 2001, Hyatt e-mailed Szczepanski, notifying him that plaintiff did not have enough work to keep her busy. Hyatt also stated plaintiff had not sought out any work assignments from him and suggested that plaintiff was spending her work time doing crossword puzzles. Hyatt later admitted that he had not been providing plaintiff with a lot of work because plaintiff was in the middle of moving her office and he did not want to overburden her.

On January 31, 2002, defendants informed plaintiff that her position was being eliminated due to reorganization. Plaintiff's termination was effective February 15, 2002. Szczepanski and Hyatt participated in the decision to eliminate plaintiff's position. In the termination letter, defendants stated that there could be other available positions that plaintiff could "bump" into. Under the Collective Bargaining Agreement governing plaintiff's employment relationship, plaintiff could bump another employee from his or her position and thereby retain employment. To qualify, plaintiff needed to meet the minimum qualifications for the position's classification and be able to perform the specific requirements of the position within thirty

days. Collective Bargaining Agreement, Art. 70, Sec.3(e).

The termination letter was attached to an Option Selection Sheet in which plaintiff could select which positions she would like to bump into. Four options were available to plaintiff: (1) displace a less senior person with the same job classification; (2) displace a less senior person in a classification plaintiff previously held; (3) be demoted to a less senior position in any classification; or (4) be laid off. Collective Bargaining Agreement, Art. 70, Sec. 3. Plaintiff elected to displace the ODA employee with the lowest seniority in plaintiff's current classification in a position for which she was qualified.

Under plaintiff's election, only one position in the ODA was available for plaintiff—the Grants Administrative Officer in the ODA's Natural Resources Division Soil and Water District Conservation Program. At the time, the position was held by another employee. Plaintiff elected to bump the employee. On February 8, 2002, Karin Nilsson ("Nilsson") in the Human Resources Department informed plaintiff that plaintiff possessed the general skills and abilities required for bumping into the Grants Administrator Office position. However, Nilsson concluded that plaintiff would be unable to adequately train for the duties of the job within the thirty-day orientation period.

On January 24, 2002, Hyatt e-mailed Nilsson regarding an open position for a "Sample Tracker." Hyatt told Nilsson that no ESC employee was qualified for the position because it required specialized training that only the incumbent had

received. Plaintiff contends she would have been able to perform the Sample Tracker position based on previous experience. However, the Sample Tracker position was not within plaintiff's classification and plaintiff elected to be considered only for jobs in her classification. As a result, she was not considered for bumping into the Sample Tracker position.

In mid to late January 2002, Hyatt allegedly had a conversation with Sherrie Hamelund ("Hamelund"), an ODA employee, regarding the potential for future lay-offs. During the conversation, the potential termination of Janis Brown ("Brown"), a minority female employee, was discussed. According to Hamelund, Hyatt said, "I can't lay off Ms. Brown because I've already gotten rid of two minority females." Hamelund believed that Hyatt was referencing the recent terminations of Corristan and plaintiff.

On February 7, 2002, Hyatt e-mailed Nilsson and Szczepanski informing them that plaintiff planned on taking sick leave during the three days leading up to her termination date. Hyatt stated that plaintiff appeared to be abusing her sick leave. In her response e-mail, Nilsson informed Hyatt and Szczepanski that they should tell plaintiff immediately that plaintiff's intention to use sick leave was inappropriate unless there was a legitimate medical reason for her absence, accompanied by a medical note. Pursuant to plaintiff's Collective Bargaining Agreement, an employer is allowed to request certification by a doctor when sick leave is taken if the employer suspects that the employee is abusing sick leave. Collective Bargaining Agreement, Art. 56, Sec. 2.

Nilsson suggested in an e-mail the following day that Hyatt and Szczepanski place plaintiff on paid administrative leave instead of sick leave for the days preceding her termination date.

Hyatt also informed Nilsson via e-mail that plaintiff was starting her own consulting company and suggested that she may be stealing client lists and using state resources to begin her business. Nilsson told Szczepanski and Hyatt to collect plaintiff's state assigned property during her paid administrative leave.

Plaintiff subsequently requested an explanation regarding why Hyatt was accusing plaintiff of abusing sick leave. Nilsson sent a letter to plaintiff, advising her that Hyatt had checked plaintiff's daily planner because he needed information on a company and knew that plaintiff recorded client information in her planner. While looking through plaintiff's planner, Hyatt noticed that plaintiff indicated that she would be using sick leave for the three days leading up to her termination date.

Plaintiff asserts that this cannot be true because plaintiff had her planner with her that day. She argues that Hyatt instead went through her desk or her computer looking for information to use against her.

On February 15, 2002, plaintiff wrote a letter to Nilsson, accusing Hyatt of racial and sexual harassment. Plaintiff identified other women and minority employees whom plaintiff believed were also harassed by Hyatt and she identified potential witnesses who could corroborate plaintiff's allegations. Nilsson did not respond to plaintiff's

complaint and did not attempt to interview any of plaintiff's witnesses.

Under plaintiff's Collective Bargaining Agreement, plaintiff asserts that she could not be terminated without just cause. Plaintiff contends that she did not receive any notice of her right to a post-termination hearing.

Corristan does not believe that plaintiff's position was terminated as part of the General Fund Budget Reduction approved by the legislature in February 2002 because plaintiff's position was completely funded by other sources. Thus, eliminating plaintiff's position would not help the General Fund. On June 28, 2002, plaintiff filed a complaint against defendants with the Oregon Bureau of Labor and Industries ("BOLI"). In her BOLI complaint, plaintiff alleged that defendants subjected her to differential treatment, harassment, and that Hyatt made jokes of a sexual nature to her. Plaintiff further alleged that defendants retaliated against her for using the Oregon Family Leave Act ("OFLA"), because defendants counted OFLA time against plaintiff and used it as a reason to terminate her.

**CLAIMS FOR RELIEF**

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee on the basis of an employee's sex and ethnicity. It is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The plaintiff in a Title VII case bears the initial burden of presenting a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In a disparate treatment case the burden of persuasion remains with the plaintiff. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). An individual is subject to disparate treatment when she is singled out or treated less favorably than others similarly situated because of her race, gender, and/or national origin. *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 546 (9th Cir. 1982). A *prima facie* case can be established through direct evidence of intentional discrimination or circumstantial evidence that creates an inference that the employer's conduct was more likely than not motivated by discrimination. *Nanty v. Barrows Co.*, 660 F.2d 1327, 1331 (9th Cir. 1981).

The elements required to establish a *prima facie* case are the same under Title VII, § 1983, and § 1981. *See, e.g., Thompson v. Potomac Elec. Power*

*Co.*, 312 F.3d 645, 649 n.1 (4th Cir. 2002) (recognizing that there is some necessary overlap of Title VII and § 1981); *Sischo-Nowenjad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1112-13 (9th Cir. 1991) (holding that a plaintiff who fails to establish a *prima facie* case under Title VII also fails to establish a *prima facie* case under § 1983). After the plaintiff has presented her *prima facie* case, the burden of production shifts to the defendant employer to provide legitimate, nondiscriminatory reasons for the employer's conduct. *McDonnell Douglas*, 411 U.S. at 802.

If the employer is able to meet this burden, the burden of production returns to the plaintiff to prove that the employer's stated reasons are pretextual. *Burdine*, 450 U.S. at 253. Plaintiff needs to produce "very little" direct evidence to withstand a motion for summary judgment. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998). On the other hand, plaintiff must make a "specific and substantial" showing of pretext when relying upon circumstantial evidence—evidence that merely tends to show pretext without establishing it conclusively. *Id.* at 1222 (holding that evidence is not specific and substantial when nothing beyond that produced to make out a *prima facie* case is presented). Plaintiff's evidence is considered below.

**1. Failure to Promote**

The First, Third, and Fourth Claims for Relief allege that defendants failed to promote plaintiff because of her sex and ethnicity in violation of 42 U.S.C. §§ 1981, 1983, and § 2000e-2(a). To make out a claim for discrimination based on a failure to

promote under the *McDonnell Douglas*, plaintiff must first establish her *prima facie* case. She must show:

> (1) she is a member of a protected class; (2) she applied for a position for which she was qualified; (3) the employer rejected plaintiff; and (4) the employer continued to seek applicants from persons of plaintiff's qualifications.

*Id.* at 802.

Plaintiff is a female of Indian descent. Plaintiff applied for the position of ESC Manager in September 2001. According to Corristan, plaintiff was qualified for the position. Defendants rejected plaintiff for the position and hired Hyatt. These facts establish a *prima facie* case of discrimination. Defendants argue that they had legitimate, nondiscriminatory reasons for hiring Hyatt over plaintiff: Hyatt possessed superior business management skills than plaintiff and he understood the technical needs of the laboratory better than plaintiff.

Plaintiff must therefore show that there is an issue of fact as to whether the proffered reasons are merely pretextual. Plaintiff argues that the following is circumstantial evidence showing that defendants' explanations are pretextual: (1) she was more qualified than Hyatt; (2) Szczepanski manipulated the interview panel; (3) a panelist rated plaintiff higher than Hyatt; and (4) Hyatt was not qualified for the position.

Plaintiff argues that she was more qualified for the ESC Manager position than Hyatt because she had two master's degrees in laboratory sciences, had worked in the ESC for nine years, and had experience negotiating international contracts for the ESC. Hyatt worked in the Laboratory Services Division and the Administrative Services Division before he was promoted to ESC Manager, and had only a bachelor's degree in biology.

An employer has the authority to make subjective decisions regarding candidates for promotion and the value of their credentials. *Casillas v. United States Navy*, 735 F.2d 338 (9th Cir. 1984) ("Title VII is not a civil code of employment criteria and it 'was not intended to diminish traditional management prerogatives'") (citing *Burdine*, 450 U.S. at 259); *see also Ward v. Westland Plastics*, 651 F.2d 1266, 1270 (9th Cir. 1980) (subjective evaluation by an employer is not *per se* prohibited by Title VII).

Title VII prohibits employment decisions that are grounded on impermissible discriminatory criteria but it does not prohibit subjective criteria. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1481 (9th Cir. 1987) (en banc). However, subjective practices are ready mechanisms for discrimination and courts should closely scrutinize an employer's use of subjective criteria. *Jauregui v. City of Glendale*, 852 F.2d 1128, 1135 (9th Cir. 1988) ("Where subjective evaluations are made, if the members of the selection panel could manipulate the criteria and the weighting system in order to eliminate certain candidates, then the selection process could be used for purposes of unlawful discrimination," regardless of the fact that the

system was chosen prior to identifying the applicants). *Id.* at 1136.

Plaintiff also argues that Szczepanski manipulated the interview panel to favor Hyatt. The ESC staff recommended that the new ESC Manager have at least a master's degree in a laboratory science. Szczepanski did not follow this recommendation and posted the job's qualifications without this requirement. Moreover, the hiring panel did not ask the agreed-upon question inquiring about experiences with foreign officials and food standards. Plaintiff contends that eliminating that question benefitted Hyatt because he had no such experience and harmed plaintiff because she had substantial experience in this area. Plaintiff also notes that shortly before the hiring process, Szczepanski removed Corristan, plaintiff's supervisor, from her duties at the ESC and from the selection process. Plaintiff argues that in doing so, defendants removed a panelist who looked favorably upon plaintiff's qualifications.

Plaintiff also asserts that an independent panelist rated plaintiff better than Hyatt. There were three panelists: Szczepanski, Karla Valness ("Valness"), an ODA manager, and Professor Bob McGorin of Oregon State University. Valness was an office manager who reported to Szczepanski. Valness stated that she did not understand some of the interview questions and debated whether she had the technical background to evaluate the veracity of the interviewees' answers. In Professor McGorin's estimation, plaintiff was a better candidate for the ESC Manager position than Hyatt.

Finally, plaintiff argues that Hyatt was unqualified to be ESC Manager. The job announcement required at least one year of program/project leader experience in either developing program rules and policies, developing goals and plans, project evaluation, or monitoring a budget. Plaintiff argues that although Hyatt had experience as a Lead Worker in the ODA, the Lead Worker position did not include development of goals and plans, program evaluation, or monitoring a budget.

Construing the facts in the light most favorable to plaintiff and considering the potential for manipulation and discrimination inherent in the use of subjective evaluations, this court concludes that questions of fact exist as to whether plaintiff was subjected to unlawful disparate treatment. Accordingly, defendants' motion is denied as to this claim.

Defendants also argue that plaintiff cannot maintain a claim for promotion because she failed to raise the issue in her BOLI complaint. Before a federal court has subject matter jurisdiction over Title VII claims a plaintiff must exhaust administrative remedies by filing a complaint with the United States Equal Employment Opportunity Commission ("EEOC"). *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002). The court then has subject matter jurisdiction over all claims that fall within the scope of the EEOC investigation or an investigation that could reasonably be expected to stem from a claim. *Id.* at 1100. In determining whether a current claim is reasonably related to the charges in the BOLI complaint, the court considers

the following: (1) the alleged basis of the discrimination; (2) the dates the alleged discriminatory acts occurred; (3) the alleged perpetrators of discrimination; and (4) the locations at which the alleged discrimination occurred. *Id.*

Plaintiff's BOLI complaint alleged that she was subject to differential treatment, harassment, and comments of a sexual nature on the basis of her race, sex, and/or national origin, and because she opposed discrimination at work. The alleged basis of discrimination, dates of the discriminatory acts, perpetrators, and locations of discriminations as stated in the BOLI complaint are generally the same as presented in plaintiff's failure to promote claim. The court finds the failure to promote claim is reasonably related to the claims alleged in the BOLI complaint.

**2. Harassment**

The first four claims for relief allege claims for harassment based on sex and/or retaliation in violation of Title VII and 42 U.S.C. § 1983. A *prima facie* case of harassment based on gender can be made by showing that the defendant subjected the plaintiff to a hostile work environment. Under this theory, a plaintiff must show that she was subjected to unwelcome verbal or physical conduct of a sexual nature and that the conduct was "sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment and create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991). The work environment must be both subjectively and objectively hostile. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Whether the

workplace is objectively hostile is determined from the perspective of a reasonable person with the plaintiff's fundamental characteristics. *See Ellison*, 924 F.2d at 879. In determining whether a work environment is hostile, the court must look at the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Only extreme conduct will amount to a change in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). A hostile work environment may also be the basis for a retaliation claim. *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000).

Plaintiff presents the following factual occurrences as evidence that defendants created a hostile work environment: defendants limited plaintiff's work to tasks that were insufficient to justify a full-time position; Hyatt made false complaints to Human Resources that she was abusing sick leave; defendants exchanged secret e-mails regarding plaintiff; and defendants interfered with plaintiff's ability to bump into other positions. In addition, plaintiff cites to three comments of a sexual nature that Hyatt allegedly uttered. First, Hyatt made a comment that he had been engaged in the same sex since he was married. Plaintiff was not present when this comment was allegedly made. Second, Hyatt made a comment about a tattoo on the buttocks of another employee. Third, Hyatt made a

comment about his prostate gland. Plaintiff was present when these comments were allegedly made.

After examining other cases in which courts have found that harassment was so severe and pervasive as to alter the terms and conditions of employment, this court finds as a matter of law that plaintiff's allegations do not rise to the requisite level of severity. *See, e.g., Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999) (court reversing the district court's entry of summary judgment against the plaintiff where the plaintiff averred that her supervisors made repeated sexual advances to her, gave her a cartoon depicting her naked, and regularly referred to as "the office sex goddess" and other offensive monikers); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998) (holding that genuine issues of material fact existed as to the plaintiff's hostile work environment claim where female employee alleged that her supervisor repeatedly told her his sexual fantasies, commented on the plaintiff's "ass" and that "it would be fun to get into [the plaintiff's] pants"); and *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (holding that repeated vulgarities, sexual comments, and requests for sexual favors by a hotel employee subjected female staff to severe and pervasive sexual harassment).

The court finds that the alleged conduct in this case falls short of the magnitude of severity or pervasiveness required to alter the terms and conditions of plaintiff's employment. Accordingly, defendant's motion is granted as to this claim.

**3. Termination**

Plaintiff alleges that defendants terminated her under the guise of a workforce reduction. To make out a *prima facie* case of discrimination in the context of a reduction in force, plaintiff must show: (1) she is a member of a protected class; (2) she was discharged from a job that she was qualified for; and (3) that others not in her protected class were treated more favorably. *Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993). Plaintiff argues that she was qualified for the position she held and was essentially replaced by Hyatt, a Caucasian male. Plaintiff argues that the following evidence establishes that she was terminated unlawfully:

- During plaintiff's tenure, the ESC consistently generated sufficient funds to pay for its own expenses and to provide revenue to subsidize other programs.
- For the first half of 2001, under Corristan's supervision and with plaintiff's assistance, the ESC generated a profit of approximately $ 250,000.
- Prior to Hyatt's promotion to ESC Manager, plaintiff performed several of the duties of ESC Manager. In October 2001, Governor Kitzhaber informed the ODA to prepare for budget reductions. Shortly thereafter, Szczepanski and Hyatt began removing plaintiff's duties and reassigning them to Hyatt.
- The Oregon Legislature approved the ODA's budget reduction plan in February

> 2002. The only two permanent full-time employees who were terminated as part of the reduction in force were both members of protected classes.

The court finds that plaintiff has presented sufficient evidence to state a *prima facie* case of discrimination in her termination. To show legitimate, nondiscriminatory reasons for plaintiff's termination, defendants argue that plaintiff's position was eliminated for budgetary reasons and that plaintiff's layoff was the result of an economic crisis. Defendants claim that it was financially in their best interests to eliminate plaintiff's position.

Genuine issues of material fact exist as to whether defendants' proffered explanations are pretextual. Prior to being promoted to ESC Manager, Hyatt allegedly told Sangrey that he was working on a plan to get rid of Corristan and plaintiff. After Hyatt became ESC Manager, he allegedly told Hamelund that he could not lay off another female minority because he had already terminated two female minority employees. Hyatt allegedly reported to Human Resources that no ESC employee could fill the Sample Tracker position. Hyatt allegedly accused plaintiff of a known practice of abusing sick leave and implied that plaintiff was stealing client lists and using state resources to start her own private consulting company. Hyatt allegedly complained to Corristan that plaintiff was working insufficient hours although Corristan found Hyatt's criticisms to be unfounded. Although Nilsson admitted that plaintiff was qualified to bump into the Grants Administrator Position, she refused to allow plaintiff

to do so, stating that she did not think plaintiff could adequately learn the position's duties within thirty days. According to Corristan, plaintiff's position was not cut for budgetary reasons because eliminating plaintiff's position would not have provided savings for the General Fund.

The court finds that this evidence is sufficient to create an issue of fact as to whether defendants were motivated to terminate plaintiff for discriminatory reasons. Accordingly, defendants' motion is denied as to this claim.

**4. Retaliation**

Plaintiff's Second Claim for Relief alleges that defendants retaliated against her for opposing unlawful employment practices in the workplace. To present a *prima facie* case for retaliation, plaintiff must show that: (1) she engaged in a protected activity; (2) defendants subjected her to an adverse employment action; and (3) the adverse employment action was a result of plaintiff's engagement in the protected activity. *Ray*, 217 F.3d at 1240. To establish the first element, the plaintiff need show only that the plaintiff had a reasonable belief that the employment practice she complained of was prohibited under Title VII. *Trent v. Valley Elec. Ass'n, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994).

In 2001, plaintiff complained to Corristan that Hyatt was tampering with her computer in an attempt to harass her and that he had made inappropriate comments of a sexual nature to her. Corristan met with Hyatt and told him of plaintiff's complaints. Corristan ordered Hyatt to attend diversity training and anger management or conflict

resolution training. After plaintiff complained to Corristan, Hyatt became ESC Manager and allegedly set in motion the course of action that led to plaintiff's termination. This is sufficient evidence to present a *prima facie* case of retaliation.

Defendants argue that plaintiff cannot meet the first element of a *prima facie* showing of retaliation because she did not ground her complaints in statutory harassment. However, making an informal complaint to a supervisor, regardless of whether the employee recognizes that the alleged conduct is unlawful under Title VII, is a protected activity. *See Hacienda Hotel*, 881 F.2d at 1514; *see also Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (recognizing that protected activity includes seeking conciliation or informally voicing concerns to a supervisor). Accordingly, defendants' motion is denied as to this claim.

**5. Procedural Due Process**

Plaintiff's Fifth Claim for Relief alleges that Hyatt and Szczepanski violated her procedural due process rights. Plaintiff asserts that defendants impaired her interest in her property right by terminating her employment and interfering with her ability to bump into another position as provided for in the Collective Bargaining Agreement. Plaintiff was not allowed to bump into the position of the Grants Administrative Officer and was not notified of the position of Sample Tracker. Plaintiff claims she was not advised of her right to a hearing to contest either the refusal to bump into these positions or her termination. *See Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 332-33 (9th

Cir. 1995) (holding that a public employee must be given an opportunity for a hearing before she can be deprived of a constitutionally protected property interest); *see also Alexander v. City of Menlo Park*, 787 F.2d 1371 (9th Cir. 1986) (holding that bumping rights of employees are a constitutionally protected property interest).

To proceed on a due process claim, plaintiff must show: (1) she had a legitimate claim of entitlement to a constitutionally-protected property interest; (2) defendants impaired that property interest; and (3) she did not receive all process that was due. *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000).

Plaintiff's claim is asserted against Szczepanski and Hyatt as individuals. The record reflects that neither Szczepanski nor Hyatt was involved in plaintiff's termination process. Nilsson was in charge of plaintiff's termination procedure. Plaintiff has presented no evidence to the contrary.

The Collective Bargaining Agreement appears to provide that plaintiff could be terminated only for cause. Plaintiff received notice of her termination and the stated reasons that were due to economic downsizing. A public employer may satisfy its procedural due process requirements through a collective bargaining agreement, providing that those procedures satisfy due process. *Mathews v. Eldridge*, 424 U.S. 319 (1976) ("'Due process is flexible and calls for such procedural protections as the particular situation demands.'") (citation omitted).

The Collective Bargaining Agreement outlines the process due in the case of a layoff, and the process for

filing grievances and seeking arbitration. Collective Bargaining Agreement, Arts. 21, 22, 70. The agreement provides that an employee shall be notified of her contractual bumping rights and options and notify the employer within five calendar days of the option she chooses.

Plaintiff chose to bump other employees within her classification. There was only one position held by someone in plaintiff's same classification that had less seniority: the Grants Administrative Officer position. The Sample Tracker position was not within plaintiff's classification. Although Nilsson determined that plaintiff met the minimum qualifications for the Grants Administrative Officer position, Nilsson concluded that plaintiff could not adequately perform the job within the requisite thirty days due to necessary background experience that plaintiff did not have. This result was not improper. There is nothing in the agreement that provides that defendants must offer plaintiff a different bumping option or to open up other positions once plaintiff has made her election.

Plaintiff also asserts that she was deprived of due process because she did not know she had a right to a hearing regarding either her termination or the denial of her bumping rights. This argument is unpersuasive. Plaintiff acknowledged that she received the Collective Bargaining Agreement and had read and understood it. Even if plaintiff was unaware of her rights, she should have known of them as they were set forth in the agreement. *See Beckwith v. County of Clark*, 827 F.2d 595, 598 (9th Cir. 1987) (holding that the notice required by due process can be actual or constructive).

Plaintiff has failed to meet her burden of showing the existence of a genuine issue of material fact. Accordingly, defendants' motion is granted as to this claim.

**6. Substantive Due Process**

When an employee is deprived of her employment through government conduct, the employee may sue for interference with contractual relationships and/or a violation of substantive due process for impairing the employee's property interest. *Merritt v. Mackey*, 827 F.2d 1368, 1371 (9th Cir. 1987) (citing *Greene v. McElroy*, 360 U.S. 474, 493 n.22 (1959)). To establish a violation of substantive due process in connection with a decision to terminate employment, plaintiff must show that defendants impaired her constitutionally protected property interest for reasons that were clearly arbitrary and unreasonable. *Fed. Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991).

Viewing the facts in the light most favorable to plaintiff, the court finds that the following evidence raises issues of fact as to whether defendants violated plaintiff's substantive due process rights: Hyatt was allegedly working on a plan to remove Corristan and plaintiff based on their race, gender, and/or national origin; Hyatt allegedly retaliated against plaintiff for complaining of harassment to Corristan; there is no evidence that plaintiff performed her job poorly; and plaintiff's position was funded from sources other than from the General Fund. A reasonable finder of fact could conclude that Hyatt and Szczepanski impaired plaintiff's interest in continued employment for arbitrary and

unreasonable purposes. Accordingly, defendants' motion is denied as to this claim.

**7. Section 1983**

Plaintiff's Third (equal protection) and Fifth (due process) Claims for Relief allege that Hyatt and Szcepanski acted intentionally under the color of state law to deprive plaintiff of her constitutional rights in violation of § 1983. Section 1983 provides, in pertinent part, that "every person who, under color of any statute of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." An individual "subjects" another to the deprivation of a constitutional right if he does an affirmative act, participates in another's affirmative acts, or fails to perform an act which he is legally required to do that causes the alleged constitutional deprivation. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 854 (9th Cir. 1999). Personal participation is not the only basis for section 1983 liability; anyone who "causes" an individual to be subjected to a constitutional deprivation is also liable. This can be established by showing that an individual set in motion a series of acts by others that the actor knew or reasonably should have known would cause others to violate plaintiff's constitutional rights. *Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997).

Hyatt allegedly told Sangrey that he was working on a plan to terminate Corristan and plaintiff. Hyatt allegedly suggested that Szczepanski take certain personnel actions against Corristan and plaintiff

that Szczepanski implemented. Hyatt allegedly told Hamelund that he could not terminate another minority female employee because he had already gotten rid of two female minorities.

Based on the foregoing, this court finds that questions of fact exist as to whether Hyatt and Szcepanski acted intentionally to terminate plaintiff in violation of her constitutional rights. Accordingly, defendants' motion is denied as to those claims.

**8. Section 1981**

Plaintiff's Fourth Claim for Relief alleges that the ODA is liable under § 1981 for Hyatt and Szczepanski's conduct because plaintiff's constitutional injuries were the result of a custom, policy, or practice of the ODA. Section 1981 provides in part, "All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." The Civil Rights Act of 1991 amended § 1981 to include "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c).

In *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735-36 (1989), the Supreme Court declined to allow the plaintiff to bring §§ 1981 and 1983 actions against the school district and principal, two years prior to the amendment of § 1981, holding "that the express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the

exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against the state actor." (quoting § 1983). The Court also held that plaintiffs suing municipalities must establish that their injury was caused by the municipality's official custom or policy. *Id.* Defendants argue that based on *Jett*, plaintiff cannot bring a § 1981 action against the ODA because she also alleges claims against Hyatt and Szczepanski under § 1983.

The Ninth Circuit attempted to answer the question of whether the amendment to § 1981 overturned *Jet* in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996). The Ninth Circuit concluded that the amended § 1981 contains an implied cause of action against state actors. *Id.* at 1214. The court reasoned that after looking at the text of the statute, the legislative history, and the legislative scheme of which § 1981 was a part, the amendment intended to authorize a private cause of action against municipalities. Specifically, the legislative history evidenced an intent to provide parallel protections against state actors and private actors, and that implying a direct cause of action against state actors under § 1981 is consistent with this intent. *Id.* at 1211-13. The court held that the amendment to § 1981 preserved *Jett*'s requirement that the plaintiff plead and prove that the violation of § 1981 was caused by a custom or policy of the state actor. *Id.* at 1215.

Defendants argue that *Federation* is inapposite to the facts of this case because *Federation* involved a suit against a city and not a state governmental

agency, and that under *Jett*, § 1983 provides the exclusive federal damages remedy for claims against a state actor. Defendants invite the court to draw a distinction between suits against a city and suits against a state governmental agency. Neither the amended § 1981, nor *Jett*, nor *Federation* provide for such a distinction. Moreover, in determining that the court's interpretation of the amended § 1981 was consistent with the underlying purposes of the overall legislative scheme, the court in *Federation* stated, "Allowing plaintiffs to bring suits against municipalities directly under § 1981 to enforce § 1981 rights instead of under § 1983 imposes no substantive change on federal civil rights law." *Id.* at 1214. Similarly, this court concludes that allowing a plaintiff to bring a suit against a state governmental agency directly under § 1981 to enforce § 1981 rights in the same fashion as a plaintiff who brings a suit against a city "imposes no substantive change on federal civil rights law." Thus, the court finds that *Federation* applies equally to suits against a city and suits against a state governmental agency.

Defendants also argue that even if plaintiff is able to proceed on a § 1981 claim, she may do so only on the basis of race. This court agrees. It is well-established that § 1981 was created to prohibit all private racial discrimination. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). Although a plaintiff may plead other bases for discrimination, only allegations of racial discrimination will survive under § 1981. *Jones v. Bechtel*, 788 F.2d 571, 574 (9th Cir. 1986).

Accordingly, this court concludes that defendants' motion is granted as to the grounds plaintiff presents to support this claim, except the ground of racial discrimination.

**9. Intentional Interference with Contract**

Plaintiff's Sixth Claim for Relief avers that Szczepanski and Hyatt interfered intentionally with plaintiff's employment contract. In order to state a claim for intentional interference with contract, plaintiff must show that: (1) a contract existed; (2) intentional interference with the contract; (3) by a third party; (4) accomplished through inappropriate means or for an inappropriate purpose; (5) a causal effect between the interference and damage to the contractual relationship; and (6) damages. *Volm v. Legacy Health Sys.*, 237 F. Supp. 2d 1166, 1176 (D. Or. 2002) (citing *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841, 844 (Or. 1995)).

The parties dispute whether Szczepanski and Hyatt were third parties. When it is alleged that another employee interfered with a plaintiff's contract, whether that employee is a third party turns on whether that employee was acting within the scope of his or her duties. *McGanty*, 901 P.2d at 845-46. This analysis is guided by the doctrine of *respondeat superior*, which provides that an employer is liable for the torts of an employee when the employee acts within the scope of his or her employment. *Chesterman v. Barmon*, 305 Ore. 439, 753 P.2d 404, 406 (Or. 1988). An employee acts outside the scope if the employee's actions are motivated without any purpose to serve the employer. *Vinsonhaler v. Quantum Residential*

*Corp.*, 189 Or. App. 1, 73 P.3d 930, 932-33 (Or. App. 2003); *see also Huston v. Trans-Mark Serv.'s*, 45 Or. App. 801, 609 P.2d 848 (Or. App. 1980) (supervisor acted with an improper motive when he induced the employer to terminate plaintiff for retaliatory purposes); *Clackamas Fire Prot. Dist. No. 1 v. Oregon Bureau of Labor and Indus.*, 50 Or. App. 337, 624 P.2d 141, 151 (Or. App. 1981) (acts of discrimination are not within the scope of employment).

For the reasons provided in other sections of this opinion, the court finds that plaintiff has offered evidence sufficient to raise questions of fact as to whether Szczepanski and Hyatt developed and implemented a plan to terminate plaintiff because of her race, gender, and/or national origin. Accordingly, it is for a finder of fact to determine whether Szczepanski and Hyatt acted outside the scope of their employment and interfered intentionally with plaintiff's contractual relationship.

Defendants further argue that Szczepanski should not be maintained in this action as an individual party. The court disagrees. As described above, plaintiff has presented evidence sufficient to create triable questions of fact as to whether Szczepanski discriminated against plaintiff in the promotion process and intentionally interfered with plaintiff's contractual rights. Thus, defendants' motion is denied as to this claim.

Alternatively, defendants argue that Szczepanski and Hyatt are entitled to discretionary immunity. Because questions of fact exist as to whether Szczepanski and Hyatt acted outside the scope of their employment, the defense of immunity is not

dispositive and defendants' motion is denied as to this claim.

## CONCLUSION

Plaintiff's First Claim for Relief alleges that the ODA violated Title VII and asserts four grounds. For the reasons provided above, defendants' motion is granted on the harassment grounds. Plaintiff's First Claim for Relief survives as it pertains to grounds for failure to promote, denial of bumping rights, and termination for race, gender, and/or national origin. Plaintiff's Third Claim for Relief alleges that Szczepanski and Hyatt violated plaintiff's Equal Protection rights and asserts four grounds. For the reasons provided above, defendants' motion is granted on the harassment grounds. Plaintiff's Third Claim for Relief survives as it pertains to grounds for failure to promote, denial of bumping rights, and termination for race, gender, and/or national origin. Plaintiff's Fourth Claim for Relief alleges that the ODA is liable under § 1981 on the grounds of race and gender discrimination. For the reasons provided above, defendants' motion is granted on the gender discrimination ground. Plaintiff's Fourth Claim for Relief survives, but only as it to pertains to the ground of racial discrimination. Plaintiff's Fifth Claim for Relief alleges that Hyatt and Szczepanski violated plaintiff's substantive and procedural due process rights. For the reasons provided above, defendants' motion is granted insofar as it pertains to procedural due process. Plaintiff's Fifth Claim for Relief survives as it pertains to violations of substantive due process. The remainder of

defendants' Motion for Summary Judgment is denied.

DATED this 8th day of April, 2004.
/s/Donald C. Ashmanskas
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANUP ENGQUIST,

Plaintiff,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOHN SZCZEPANSKI, and JOSEPH (JEFF) HYATT,

Defendants.

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Civil No. 02-1637-AS

OPINION AND ORDER

September 14, 2004

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ASHMANSKAS, Magistrate Judge:

Plaintiff Anup Engquist filed this action in December 2002, alleging employment discrimination against her former employer, the Oregon Department of Agriculture ("ODA"). Plaintiff is a woman whose national origin is India. Defendant John Szczepanski ("Szczepanski") was the Assistant Director of the ODA during plaintiff's employment. Defendant Joseph Hyatt ("Hyatt") was the Manager of the Export Service Center ("ESC"), a subdivision of the ODA during plaintiff's

employment. Defendants Szczepanski and Hyatt are being sued in their individual and official capacities.

On April 9, 2004, this court granted in part and denied in part defendants' Motion for Summary Judgment (Doc. # 57). The court granted summary judgment in favor of defendants: (1) on plaintiff's First and Third Claims for Relief insofar as the claims alleged harassment; (2) on plaintiff's Fourth Claim for Relief insofar as the claim alleged gender discrimination; and (3) on plaintiff's Fifth Claim for Relief insofar as the claim alleged violations of procedural due process. The court denied the remainder of defendants' motion.

Plaintiff's Third Claim for Relief alleges in part that defendants are liable under the "class of one" theory as it is derived from the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On August 16, 2004, defendants filed a Motion for Partial Summary Judgment or, Alternatively, a Motion for Judgment on the Pleadings (Doc. # 69), asserting that plaintiff is unable to maintain her Section 1983 Equal Protection Claim against defendants Hyatt and Szczepanski because the "class of one" theory is inapplicable in the employment context.

Oral argument was heard on September 13, 2004. For the following reasons, defendants' motion is denied.

## PRELIMINARY PROCEDURAL MATTERS

Defendants argue in their reply brief that Szczepanski and Hyatt are not liable under the theory of qualified immunity. The court is desirous of developing a full record before ruling on this issue. Accordingly, the court denies defendants' motion

insofar as it seeks summary judgment on the issue of qualified immunity. Defendants, of course, may seek leave to raise the issue of qualified immunity at trial and on a full record. Additionally, defendants' Motion to Allow Additional Interrogatories (Doc. # 75) is denied and plaintiff's Motion to Strike (Doc. # 81) is denied.

## STANDARDS

A party is entitled to summary judgment as a matter of law if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002).

The moving party carries the initial burden of proof. The party meets this burden by identifying portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the initial burden is satisfied, the burden shifts to the nonmoving party to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Id.*

The court must view the evidence in the light most favorable to the non-moving party. *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1140 (9th Cir. 2003) (citations omitted). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000); *see also Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (in order for a plaintiff to defeat summary judgment there must be such doubt that a reasonable trier of fact could find in favor of the plaintiff). The

inferences drawn from the underlying facts shall be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Ins. Co. of N. Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

**FACTUAL BACKGROUND**

The court provided a thorough recital of the facts in its April 9, 2004, Opinion and Order. A brief summary of that recital follows.

Plaintiff worked for the ODA in December 1992 until she was terminated in February 2002. During the period of plaintiff's employment, Norma Corristan ("Corristan") was employed as the Administrator of the Laboratory Services Division at the ODA and supervised the ESC. In 1999, a managerial position at the ESC became available and remained open for over a year. During this period, plaintiff performed some of the duties of the position along with Corristan and another employee.

In July 2001, Szczepanski met with the ESC staff to discuss the vacant managerial position. The staff recommended that the new ESC Manager have at least a Master's Degree in a laboratory science. However, when the job announcement for the ESC Manager position was posted, the Master's Degree requirement was omitted from the list of qualifications. There were three applicants for the position of ESC Manager: plaintiff, Hyatt, and a female employee, Karla Sangrey ("Sangrey"). Hyatt was chosen for the position. Corristan believed that Hyatt was less qualified than plaintiff for the position. Plaintiff had two Master's

Degrees in laboratory sciences. Hyatt had a bachelor's degree in biology.

Later in July 2001, Szczepanski informed Corristan that he was phasing out Corristan's responsibilities pertaining to the ESC. In September 2001, Hyatt sent Szczepanski a proposed draft letter recommending that Szczepanski consider a personnel cut in the ESC, remove plaintiff's responsibilities, and place plaintiff under Szczepanski's supervision. Shortly thereafter, Szczepanski relieved Corristan of her supervisory responsibilities for the ESC and plaintiff began reporting to Szczepanski.

On January 31, 2002, defendants informed plaintiff that her position was being eliminated due to reorganization. Plaintiff's termination was effective February 15, 2002. Szczepanski and Hyatt participated in the decision to eliminate plaintiff's position. In the termination letter, defendants stated that there could be other positions into which plaintiff could "bump." Under the Collective Bargaining Agreement governing plaintiff's employment relationship, plaintiff could bump another employee from his or her position and thereby retain employment. To qualify, plaintiff needed to meet the minimum qualifications for the position's classification and be capable of performing the specific requirements of the position within thirty days.

Attached to the termination letter was an Option Selection Sheet in which plaintiff could select four options: (1) displace a less senior person with the same job classification; (2) displace a less senior person in a classification plaintiff held previously; (3) be demoted to a less senior position in any classification; or (4) be laid off. Plaintiff elected to displace the ODA employee

with the lowest seniority in plaintiff's current classification in a position for which she was qualified.

Under plaintiff's election, only one position in the ODA was available for plaintiff--the Grants Administrative Officer in ODA's Natural Resources Division Soil and Water District Conservation Program. Plaintiff elected to bump the employee holding that position. On February 8, 2002, Karin Nilsson ("Nilsson") in the Human Resources Department informed plaintiff that plaintiff possessed the general skills and abilities required for bumping into the Grants Administrator Office position, but that Nilsson believed plaintiff would be unable to adequately train for the duties of the job within the thirty-day orientation period.

On January 24, 2002, Hyatt e-mailed Nilsson regarding an open position for a "Sample Tracker." Hyatt told Nilsson that no ESC employee was qualified for the position because it required specialized training that only the incumbent had received. Plaintiff contends she would have been able to perform the Sample Tracker position based on previous experience. However, the Sample Tracker position was not within plaintiff's classification and plaintiff had elected to be considered only for jobs in her classification. As a result, she was not considered for bumping into the Sample Tracker position.

Sherrie Hamelund ("Hamelund"), an ODA employee, alleges that she had a conversation with Hyatt in mid January 2002 regarding the potential for future lay-offs. During the conversation, the potential termination of Janis Brown ("Brown"), a minority female employee, was discussed. According to Hamelund, Hyatt said, "I can't lay off Ms. Brown

because I've already gotten rid of two minority females." Hamelund believed that Hyatt was referencing the recent terminations of Corristan and plaintiff.

On February 15, 2002, plaintiff wrote a letter to Nilsson, accusing Hyatt of racial and sexual harassment. Plaintiff identified other women and minority employees whom plaintiff believed were also harassed by Hyatt and she identified potential witnesses who could corroborate plaintiff's allegations. Nilsson did not respond to plaintiff's complaint and did not attempt to interview any of plaintiff's witnesses. Ten months later, plaintiff filed this lawsuit.

## DISCUSSION

42 U.S.C. § 1983 "creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in part that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws." In essence, the Clause guarantees that people who are similarly situated will be treated similarly.

The Equal Protection Clause is intended to protect every person within a state's jurisdiction "against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (citations omitted). The Clause protects a "class of one" when a plaintiff can show that he or she has been intentionally treated differently

than others similarly situated and there is no rational basis for the different treatment. *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). The number of individuals in a class is of no consequence for the equal protection analysis, although "classifications should be scrutinized more carefully the smaller and more vulnerable the class is [and a] class of one is likely to be the most vulnerable of all." *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)); *see also Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (Equal Protection Clause protects not only groups, but individuals who would constitute a "class of one").

In *Willowbrook*, a property owner alleged that the city violated her equal protection rights when it conditioned her connection to a municipal water supply upon the granting of an easement. *Willowbrook*, 528 U.S. at 563. The plaintiff asserted that the city's discriminatory behavior was irrational and wholly arbitrary and motivated by ill will. The district court dismissed the lawsuit for failure to state a cognizable claim. The Court of Appeals for the Seventh Circuit reversed and the Supreme Court affirmed, holding that the Equal Protection Clause does protect a cause of action on behalf of a "class of one" where the plaintiff does not allege membership in a class or group. *Id.* at 563-64.

Defendants contend that plaintiff's "class of one" theory cannot be maintained because in deciding *Willowbrook*, the Supreme Court did not intend to expand the theory beyond the regulatory context. This

court disagrees.[1] The Court's language in *Willowbrook* is broad and propounds no intention to limit the holding in the manner suggested by defendants.

Several circuits have either adopted or applied the "class of one" theory in the employment context, both prior and subsequent to the Court's decision in *Willowbrook*. In *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981), the Alabama Peace Officer Standards and Training Commission terminated a patrolman for being convicted of two misdemeanors. *Id.* at 778. However, the Commission did not terminate other police officers who had been convicted of similar or more serious crimes. *Id.* at 779. The Fifth Circuit held that the Commission violated the plaintiff's equal protection rights because it failed to offer a rational justification for the differential treatment accorded to the plaintiff. *Id.* The Seventh Circuit held in *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), that the Chicago Fire Department violated a terminated paramedic's equal protection rights when it arbitrarily and irrationally discharged the plaintiff for failing to properly treat a patient, but did not terminate nor discipline another paramedic who was equally responsible for the patient's welfare. *Id.* at 522-23.

Courts have applied the "class of one" theory outside of the regulatory context and in the area of employment

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[1] This court is aware that Judge Hubel and Judge Haggerty have previously alluded to the application of *Willowbrook* in *Cain v. Tigard-Tualatin School District*, 262 F. Supp.2d 1120, 1130-31 (D. Or. 2003). In addition to being dictum, this court finds that *Cain's* brief synopsis of *Willowbrook* is distinguishable from the facts of this case and therefore inapplicable.

after *Willowbrook* as well. In *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir. 2001), the Tenth Circuit found that a former school employee's "class of one" equal protection theory was viable, although the plaintiff's claim ultimately failed because he made only bare assertions of differential treatment. Nevertheless, relying on two Supreme Court cases, including *Willowbrook*, the court noted that "the Equal Protection Clause affords protection to an individual injured by intentional or purposeful discrimination, without identification of a class." *Id.* (internal quotations omitted). This court concludes that the Equal Protection Clause does provide protection to plaintiffs under the "class of one" theory and that this theory applies with equal force in the employment context.

Accordingly, the court must determine what evidence is necessary to create a triable question of fact in a "class of one" case. Under the theory urged by plaintiff, she must show that she was singled out as a result of animosity on the part of Hyatt and Szczepanski. To do so, she must show that their actions were spiteful efforts to punish her for reasons unrelated to any legitimate state objective. *Squaw Valley*, 375 F.3d at 945-46. As with any equal protection claim, plaintiff must also demonstrate that she was treated differently than others who were similarly situated. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

The Ninth Circuit has found that substantive due process and the equal protection doctrine are essentially intertwined and that evidence that is sufficient to defeat a summary judgment motion on a substantive due process claim is also sufficient to defeat a summary judgment motion on an equal

protection claim. *See, e.g., Philips v. Perry*, 106 F.3d 1420, 1427-28 (9th Cir. 1997); *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 906 n.11 (9th Cir. 1975).

This court has ruled previously that a reasonable finder of fact could conclude that Hyatt and Szczepanski arbitrarily and unreasonably impaired plaintiff's interest in continued employment, thereby violating her substantive due process rights. Hyatt was allegedly working on a plan with Szczepanski to terminate plaintiff's position based on her race, gender, and/or national origin. There is evidence that plaintiff performed her job satisfactorily and that her termination was not the result of "reorganization" or budgetary cuts. Based on this same evidence, there are genuine issues of fact as to whether plaintiff was singled out as a result of animosity on the part of Hyatt and Szczepanski, thereby violating her equal protection rights. Accordingly, the court concludes that plaintiff's "class of one" theory survives and defendants' motion is denied.

## CONCLUSION

Defendants' Motion for Partial Summary Judgment or, Alternatively, a Motion for Judgment on the Pleadings (Doc. # 69) is hereby DENIED.

DATED this 14th day of September, 2004.

Donald C. Ashmanskas

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANUP ENGQUIST,

Plaintiff,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOHN SZCZEPANSKI, and JOSEPH (JEFF) HYATT,

Defendants.

---

CIVIL NO. 02-1637-AS

MINUTE ORDER

---

10/15/04 CIVIL MINUTES: . . . Defendants' Motion in Limine #8 (to Bar Evidence Concerning Class of One Equal Protection Claim) 102 is GRANTED unless plaintiff can submit evidence of others similarly situated. . . .

## Trial Record Excerpts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANUP ENGQUIST,

Plaintiff,

vs. No. CV-02-1637-AS

OREGON DEPARTMENT OF
AGRICULTURE, JOHN SZCZEPANSKI,
and JOSEPH (JEFF) HYATT,

Defendants.

**November 17, 2004**

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* * *

JUDGE TO JURY

The burden is on the plaintiff in a civil action such as this to prove every essential element of a claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

* * *

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* * *

The plaintiff further claims that the individual defendants violated her constitutional rights to Equal Protection and Due Process of law by intentionally treating her differently from others similarly situated for vindictive, malicious or wholly arbitrary reasons, causing the denial of promotion, the loss of bumping rights and the termination of her employment.

The plaintiff also claims that the individual defendants violated her constitutional rights to Equal Protection by causing the denial of promotion, the loss of bumping rights to other jobs and the termination of her employment because of race, color, gender or national origin.

The plaintiff further claims that the individual defendants unlawfully and intentionally interfered with her employment with the Oregon Department of Agriculture with an improper purpose or using improper means, and wholly without seeking to advance the interests of that department.

In this case, the defendants contend that there were valid, legitimate and objectively reasonable reasons for all actions taken. Defendants contend that all actions were at all times reasonable, based upon legitimate public service business necessity.

* * *

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* * *

Plaintiff alleges violation of her constitutional rights to Equal Protection and Substantive Due Process. To prevail on these claims, she, in this case, must prove:

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One, that the acts or omissions of the defendants were intentional.

Two, the defendants acted under color of law.

And three, the act or omission of the defendants or one of them were the cause of deprivation of Plaintiff's rights protected by the Constitution of the United States.

In this case, the parties agree that defendants John Szczepanski and Jeff Hyatt were "acting under color of state law."

A supervisor may be liable for subjecting an employee to a deprivation of a constitutional right. A supervisor subjects an employee to the deprivation of a Constitutional right if he does an affirmative act, participates in another's affirmative acts or omits to perform an act that he is legally required to do that causes the constitutional deprivation or by setting in motion a series of acts by others that the actor knows or reasonably should know would cause others to inflict the constitutional violation.

To bring a successful Equal Protection claim under the "class of one" doctrine, Plaintiff must prove that defendants treated her differently than others similarly situated.

Second, that the different treatment caused the

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denial of Plaintiff's promotion, the exercise of her bumping rights or the termination of her employment.

Third, that no rational basis exists for the difference in treatment.

And fourth, that Defendant took these actions for arbitrary, vindictive, or malicious reasons.

To bring a successful substantive due process claim, Plaintiff must prove that:

One, she is unable to pursue her profession.

And two, the inability to pursue her profession is due to arbitrary and unreasonable government action.

* * *

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* * *

In order to recover damages for intentional interference with an employment relationship, Plaintiff must prove each of the following elements:

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One, she had an employment relationship.

Two, the defendant was not a party to the employment relationship.

Three, that Defendant intended to interfere with a relationship or know that such interference was substantially certain to occur from the defendant's actions.

Four, the defendant interfered, through improper means or for improper purpose, by denying promotion, denying bumping rights and/or terminating Defendant -- Plaintiff, excuse me.

The defendant's interference caused harm to the relationship.

And six, the defendant's interference resulted in damages to the plaintiff.

* * *

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* * *

This is a civil case. Therefore, all of you must agree on each question answered. When all of you have agreed on each question answered, your presiding juror should insert the answers on the verdict form in ink; please sign and date the verdict form. Then, signal the bailiff, and the Court

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will then be reassembled to receive your verdict.

Now, I indicated earlier that I will send in a written copy of what I just gave to you. There may be some typographical errors, there may be a caption that is misspelled, and there may be, for example, when you talk about gender, national origin, race, I may have used the conjunctive when it should probably be the disjunctive. I may have noted, when I was reading those, I made a mistake.

So with that, I'm going to ask Mr. Gale to be sworn.

(Bailiff sworn)

THE COURT: Perhaps, Mr: Gale, it would be best to just escort the jurors out first, get them organized and arrange for the lunch, and then I'll send in the different instructions and the verdict

form after you get organized. Okay? So why don't you do that.

MR. GALE: Okay.

(Whereupon the following proceedings were heard outside the presence of the jury):

THE COURT: Some comments. One is, I did note that I used the conjunctive and the disjunctive, and I think it's not that big a deal. I can go back and redo the instructions. I left out a caption on page 15, "conclusion," but that's no big deal.

The only other thought I had when I was reading

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the punitive damages, we talked about preponderance of the evidence. But then we had, on the intentional infliction, on a witness statement, we have a clear and convincing standard.

And on any of the punatives with respect to any of the claims --

MR. BRISCHETTO: Intentional interference.

THE COURT: That's what I thought. That's why I'm hesitating. We cannot make a distinction in the punitive damages instruction on that.

MR. BRISCHETTO: We don't have a definition of clear and convincing, but none was requested.

THE COURT: We can modify the punitive damages instruction to say that. I mean, this is one option, is that with respect to punitive damages -- involving possible punitive damages -- involving

intentional interference with employment relationship, it has to be done by clear and convincing evidence. "Clear and convincing evidence" is evidence that is more likely probable -- I guess that is what it is -- more likely than not -- highly probable and higher in law than the standard for reasonable doubt.

Any thoughts, Mr. Abrams?

MR. ABRAMS: We think we would like that, Your Honor. We would like to have a clarification of that.

THE COURT: I think that would be called for, even though we have not made the request.

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Mr. Brischetto, I'll hear on you that.

MR. BRISCHETTO: I don't object, Your Honor. I mean, I can agree to a paragraph or two paragraphs, something to that effect, because I think that that is the proper standard, and we've got one sentence in there.

THE COURT: I think it can be easily done. What I would propose is Mr. Gale, why don't you take the jurors down for lunch, rather than have them start anything. I'll correct that, we'll agree on the language, and then we'll send in copies of the instructions so they don't need those right away anyway. Why don't you take them to lunch.

THE CLERK: Okay.

THE COURT: With respect to the verdict form, I'm going to send in, I think, a copy for each juror. Of course, with one to be filled out, not every

one of them. That might make it easier for when they are deliberating, to look at a verdict form in front of them and then have the foreperson or the presiding juror fill out the one. So if that's not a problem, I'll do that. That's the verdict form.

Why don't we take five minutes, rather than just sitting with me. I'll try to come up with just an amendment to the punatives and make a suggestion, and I'll come back out in five or 10 minutes, make the corrections. And then if that is acceptable, we'll run off copies. Okay? So why don't you take a break for 10 minutes, and then I'll give you

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a chance to get organized, and we'll take exceptions. I have not forgotten about that.

MR. BRISCHETTO: Your Honor, were you going to read that to the jurors or just send that back in separately?

THE COURT: I'll probably have to read it. I omitted the following language from the punitive damages, and I'll also say there is a part -- we can make some minor corrections -- there is a part where the damages are limited by the amount asked for by the plaintiff in the complaint.

Well, they don't even know what the complaint is, and I'll excise, something like that, but I don't think there were many others. I think Brittany is to be thanked for putting them in order and also for putting them in a fairly straight-forward order. So let's see, give me 10 minutes.

Hang around, and I'll come up with a suggested modification. Okay?

(Recess)

THE COURT: Mr. Brischetto, why don't I ask you to start in again, if you would please, on exhibits.

MR. BRISCHETTO: Very good. Plaintiff's except to all of the proposed instructions of the plaintiff's that were not given.

Second, with respect to the class of one, Equal Protection claim, Plaintiff excepts to that instruction, Elements 3 and 4 of the instruction, repeat an element twice,

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and that is, I believe, the Element 3; that "no rational basis exists for the difference in treatment" is the definition of "arbitrary conduct." And so I think that it should read that "no rational basis exists for difference in treatment." So Defendants took these actions for vindictive or malicious reasons.

Second exception is to the intentional interference with contract, Elements 3, 4 and 5. Element 3 requires the plaintiff to prove that the defendant interfered, through improper means or for an improper purpose, by denying promotion, denying bumping rights and/or termination. In addition, Defendants' interference caused harm to the relationship. Two objections to that.

One, I think that it repeats the elements of harm. And two, I think that it narrows Plaintiff's claim. I think Plaintiff's claim for intentional interference is broader than simply denying promotion, denial of bumping rights and/or terminating Plaintiff.

Third, I except to the business judgment instruction. First, Plaintiff objects to the giving of any business judgment instruction on the grounds that it's a comment on the evidence.

Second, that the present business judgment instruction doesn't adequately distinguish between the Title 7, race, sex, national origin, Equal Protection claims

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and the remainder of the claims. The instruction is misleading on the remainder of the claims, particularly the language that says "you should not find that a decision is unlawful just because you disagree with Defendants' stated reason or because you believe the decisions were harsh or unreasonable."

The [sic] on the class of one claim and on the substantive due process claim. If the jury believes the decisions were harsh or unreasonable, those are factors that can be taken into consideration in determining arbitrary, malicious conduct.

And on the last word, "classification," I think that the word classification is unduly vague and that the jury won't understand what that reference is to. Those are my exceptions.

THE COURT: All right. Unless you want to be heard on those first, Mr. Abrams, you want to respond to any --

Mr. ABRAMS: Your Honor, I think the instructions are proper in all respects. And for the reasons we talked about during our conference yesterday, the class of one claim instruction, to the

extent it should be given at all, properly states the law.

We believe the intentional interference is proper in its scope, and that for lack of a better suggestion on how to phrase "classification" in the business judgment, I don't

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know what we could do differently on that one. We tried and failed yesterday, and a business judgment instruction is appropriate and proper to put in context, motivation and actions of individuals in a business setting. So we believe those are all appropriate constructions to be given.

Moving on to our exceptions, we'll take the similar, broad exceptions to all Defendants' instructions not given. However, specifically on page 8, lines 1 through 8, we believe there should be no instruction on class of one, Equal Protection, because we believe this is not a claim that should have been submitted to the jury. Page 8, lines 9 through 13, we take exception to the substantive due process instruction, because we believe this is a claim that should not have been submitted to the jury.

On page 12, lines 16 and 17, part of the instruction on economic damages, we believe that there's a possibility of confusion between issues of mitigation and the issue raised, for example, by the jury determining that Ms. Engquist could have been actually laid off two months or three months later in the first and second waves of layoff.

We don't believe it is our burden to prove that as mitigation; those are facts. They can reach on

their own, and as a result, the instruction really should read something along the lines of: Subparagraph 1, the amount of earnings lost by Plaintiff through the date she was terminated to the

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present date, unless you determine she would have unactionably been laid off sooner. And we think that has to be part of Plaintiff's affirmative duties.

And finally on page 14, although we've generally excepted to our instructions that were not given, I would like to specifically flag an exception to the failure to give an instruction on what we have been possibly misnaming the *Situs* instruction, but the material that was included in that. And, in addition, line 9 which reads: Self-employment is an adequate and proper way for Plaintiff to mitigate damages. We believe this is misleading, because there's no definition of what adequate civil employment is. So this is the buggy whip problem; if you decide you're starting a buggy whip operation or an operation to provide equipment for people who keep claims inside the confederacy, it's not a reasonable and rational mitigation of damages.

So those are our exceptions.

THE COURT: Is that all?

MR. COLLINS: We are an agreeable bunch, Your Honor.

THE COURT: Do you want to speak to their exception, Mr. Brischetto.

MR. BRISCHETTO: Not unless you have questions.

THE COURT: No, I'm not going to change them at this stage. I must confess that with a little more time

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beyond the two hours or so we spent yesterday, they might have been fashioned a little more carefully. And as a wordsmith, I take offense, myself, at the language we use. But you put me on notice of what the thrust of your objection is, and they were fairly stated today, and I overruled them or agreed in part or disagreed. So they will stay as is, as part of the record.

With that, as soon as we've adjusted them, we'll give you excise of the mitigation and see if that meets your high standards before we bring the jurors in. Good enough for government work.

MR. COLLINS: Good.

MR. ABRAMS: Good enough for government work, Your Honor.

THE COURT: Mr. Brischetto?

MR. BRISCHETTO: No objection.

# PETITIONER'S BRIEF

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No. 07-474

FILED
FEB 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

ANUP ENGQUIST,

*Petitioner,*

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## QUESTION PRESENTED

Whether traditional equal protection "rational basis" analysis under *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000), applies to public employers who intentionally treat similarly situated employees differently with no rational bases for arbitrary, vindictive or malicious reasons.

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## OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. 12a-69a) is reported at 478 F.3d 985.[1] The April 8, 2004 opinion of the District Court, granting in part and denying in part Respondents' summary judgment motion (JA 13), is available at 2004 WL 792790. The September 14, 2004 opinion of the District Court, denying Respondents' second summary judgment motion judgment (JA 49), is available at 2004 WL 2066748. The judgment of the District Court (Pet. 8a-11a) is not reported.[2]

## JURISDICTION

The Ninth Circuit denied Petitioner's petition for rehearing and rehearing *en banc* on July 12, 2007. Pet. 70a-71a. The certiorari petition was timely filed on October 5, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## APPLICABLE CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides, in pertinent part:

> [N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

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[1] The Ninth Circuit dismissed the Oregon Department of Agriculture from the appeal. "Respondents" herein refers to Joseph Hyatt and John Szczepanski, unless otherwise indicated.

[2] "ER" is Respondents' Excerpts of Record in the Ninth Circuit. "SER" is Petitioner's Supplemental Excerpts of Record in the Ninth Circuit.

## STATEMENT

### A. Overview

Petitioner Anup Engquist worked at the Oregon Department of Agriculture. Her complaint claimed, *inter alia*, that Respondents Joseph Hyatt and John Szczepanski caused her to lose her job "for arbitrary, vindictive, and malicious reasons in violation of the Equal Protection Clause." JA 10, ¶ 26. This claim was made under the class-of-one doctrine. See, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam). Following trial, the jury found that Respondents had intentionally treated Engquist "differently than others similarly situated . . . without any rational basis and solely for arbitrary, vindictive, or malicious reasons." Pet. 3a-4a. The Ninth Circuit reversed, holding that the Equal Protection Clause does not protect classes of one in public employment. *Id.* at 19a-27a.

### B. Facts

Anup Engquist is a woman born in India.[3] In December 1992, she was hired by the Oregon Department of Agriculture ("ODA") to work as an international food standards specialist in the Export Service Center ("ESC"), a laboratory within ODA's Laboratory Services Division ("LSD"). Pet. 14a-15a. The ESC is one of two laboratories in the LSD, and the LSD is one of ten ODA divisions.[4]

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[3] The facts set forth are taken from the extensive record of the eleven-day jury trial.

[4] Established in 1990, the ESC was initially funded by grants with the expectation that it would become self-sustaining, a goal it reached in two years. Under Corristan and Engquist, ESC was highly successful, SER 212-13, generating a profit for the State in excess of $250,000 in 18 months. After Corristan and

Engquist was hired by Norma Corristan, the LSD administrator and a Mexican-American. The ESC manager reported to Corristan. Engquist's job was to generate business for the ESC and to consult with the ESC's "customers," companies that export food overseas. Engquist developed an international database of food additives, laws, and regulations; marketed the ESC's services, which included testing and certifying exported goods and providing consulting services for customers; and created food safety training and scientific exchange programs. ER 131-34.

Respondent Joseph Hyatt was hired in 1990 as a chemist and made it difficult for Engquist to do her job. He did not communicate with her or give her information necessary for her job, and made false, derogatory statements about her to others. SER 163-64. Hyatt took it upon himself to monitor her, even following her when she went to the ladies room. *Id.* at 166. He told other employees she was absent from her work location when she was present and that she lied on time sheets. *Id.* Hyatt conceded that he made false, derogatory statements to others about Engquist. *Id.* at 254.

In response, Corristan initiated disciplinary action against Hyatt. She required him to attend anger management and diversity training programs. Corristan testified that Hyatt told her that "it made him angry to have to go." SER 194.

Afterwards, Corristan heard Hyatt comment that Engquist did not do anything, did not work, did not show up for work, and that whatever she did was

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Engquist were terminated, ESC's operation generated a loss to the State in excess of $662,000. SER 155-57.

insignificant—all claims Corristan believed were false. SER 195-96.

In December 1999, when the incumbent ESC manager left, Hyatt asked Corristan to promote him to that position. Corristan refused on the ground that he was unready to be a manager. SER 197. Denied promotion to be ESC manager a second time, Hyatt transferred from the LSD to the Administrative Services Division to work as a systems analyst in Information Services. Hyatt continued to work in the same building as Engquist, and to torment her.

Respondent John Szczepanski became ODA's Assistant Director in 2001, and oversaw the LSD. Pet. 15a. At the time, about thirty employees worked in the LSD, including about thirteen in the ESC. Trial Tr. Vol. 5, 15:6-10; *id.* at 16:23-17:2.

In June 2001, Szczepanski removed the ESC from Corristan's supervision and assumed control of the laboratory. Szczepanski contemporaneously told a customer that Corristan and Engquist "would be gotten rid of." SER 181-82. In September 2001, Hyatt told a coworker that Szczepanski had asked him to prepare a personnel plan and that the two of them were working on "getting rid of Norma and Anup." *Id.* at 188-89. Hyatt said the plan was confidential because he did not know whom to trust. *Id.*

Hyatt then sent Szczepanski an email urging him to sharply limit Corristan's and Engquist's duties. He told Szczepanski to remove Corristan from all ESC responsibilities and to eliminate Engquist's management responsibilities. Hyatt even wrote a "draft letter" for Szczepanski to send to Corristan, advising Szczepanski to "put it into your own words." SER 139. Szczepanski did as Hyatt suggested. These

communications are remarkable because at the time Hyatt did not work for LSD. *Id.* at 221-22, 259-60.

Meanwhile, since December 1999, Corristan, Engquist, and one other employee had jointly assumed the duties of the departed ESC manager. After assuming control of the ESC, Szczepanski moved to fill the position. Hyatt, Engquist, and a third employee applied for the position. Szczepanski chose Hyatt, ignoring the recommendation of an independent expert and deviating from the list of official interview questions, effective October 2001. Trial Tr. Vol. 6B, 31:15-21; *id.* at 32:7-13; Trial Tr. Vol. 4B, 91:13-92:11; Pls.' Exs. 30-31.

Almost immediately upon his appointment, Hyatt began curtailing Engquist's duties, excessively monitoring her performance and circulating false statements and innuendo to others. For example, Hyatt twice lied, telling a coworker that Enqgust was falsifying her time cards. He sent emails falsely implying that Engquist was spending work-time doing crossword puzzles, suggesting that she was abusing sick leave, and insinuating that she was using state resources to start a private business.[5] SER 143-49.

Szczepanski and Hyatt ultimately eliminated Corristan's and Engquist's positions. Szczepanski dismissed Corristan in December 2001 and Engquist in February 2002. They claimed that their actions were taken for budgetary reasons, but Engquist introduced evidence, which the jury credited, that

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[5] Engquist introduced a mountain of venomous writings and emails by Szczepanski and Hyatt expressing their antipathy toward her and Corristan. These statements were made both before and after Hyatt's promotion. A sampling is found at SER 139-57.

this was not a credible or rational justification for dismissing her and Corristan rather than others in LSD. Pursuant to her collective bargaining agreement, Engquist was given the opportunity to "bump" into another position at her level, but she was found unqualified for the only other such position. She declined to move to a position below her level.

In sum, Szczepanski gave Hyatt the promotion that Corristan had denied him, and Hyatt and Szczepanski terminated both Corristan, who had disciplined Hyatt, and Engquist, who had been a thorn in Hyatt's side for years. Across ODA's ten divisions, Corristan and Engquist were the only full-time employees who lost their jobs during this period (though other employees were subsequently dismissed). Referring by name to Corristan and Engquist, Hyatt afterward stated that he "couldn't afford to get rid of any more female minorities because he had already gotten rid of two." SER 185.

### C. District Court Proceedings

In December 2002, Engquist filed this action, naming as defendants the ODA, Szczepanski, and Hyatt, and asserting a number of claims.[6] As part of her equal protection claim, Engquist alleged that Szczepanski and Hyatt had taken adverse employment actions against her "for arbitrary,

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[6] She alleged harassment, discrimination and retaliation against ODA based on race, color, sex, and/or national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 2000e-3(a). She further claimed that Hyatt and Szczepanski engaged in discrimination based on "race, color, sex, national origin, and/or for arbitrary, and malicious reasons" in violation of the Equal Protection Clause. She also set forth claims under 42 U.S.C. § 1981, the Due Process Clause, and based on the tort of intentional interference with contract. JA 5-12.

vindictive, and malicious reasons in violation of the Equal Protection Clause." JA 10.

After discovery, Respondents moved for summary judgment. Their motion did not address Engquist's class-of-one claim. In April 2004, the District Court granted Respondents' motion in part and denied it in part.[7]

Respondents subsequently filed a motion for partial summary judgment on the class-of-one claim. In response, Engquist argued that, among their approximately 30 LSD co-workers—whom Engquist presented as the relevant comparators for purposes of her class-of-one claim—only she and Corristan were targeted for elimination for arbitrary, malicious and vindictive reasons. The District Court denied Respondents' motion:

> Under the theory urged by plaintiff, she must show that she was singled out as a result of animosity on the part of Hyatt and Szczepanski. To do so, she must show that their actions were spiteful efforts to punish her for reasons unrelated to any legitimate state objective. As with any equal protection claim, plaintiff must also demonstrate that she was treated differently than others who were similarly situated . . . .
>
> Hyatt was allegedly working on a plan with Szczepanski to terminate plaintiff's position. . . . . There is evidence that plaintiff performed her job

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[7] The District Court dismissed that portion of Engquist's Title VII and equal protection claims alleging unlawful harassment. As to her § 1981 claim, the court dismissed the portion alleging violations based on her gender. As to her due process claim, the court dismissed the portion alleging violations of procedural due process. The court denied the remainder of the motion. JA 13-48.

> satisfactorily and that her termination was not the result of "reorganization" or budgetary cuts. Based on this same evidence, there are genuine issues of fact as to whether plaintiff was singled out as a result of animosity on the part of Hyatt and Szczepanski, thereby violating her equal protection rights. Accordingly, the court concludes that plaintiff's "class of one" theory survives and defendants' motion is denied.

JA 58-59 (citations omitted).

Engquist's case proceeded to an eleven-day trial. At the close of the evidence, the District Court instructed the jury:

> To bring a successful Equal Protection claim under the "class of one" doctrine, Plaintiff must prove that defendants treated her differently than others similarly situated.
>
> Second, that the different treatment caused the denial of Plaintiff's promotion, the exercise of her bumping rights or the termination of her employment.
>
> Third, that no rational basis exists for the difference in treatment.
>
> And fourth, that Defendant took these actions for arbitrary, vindictive, or malicious reasons.

JA 63-64.

The jury unanimously returned a verdict for Engquist on her class-of-one claim. The jury also returned verdicts for Engquist on her substantive due process and intentional interference with contract

claims. Finally, the jury also rejected Respondents' qualified-immunity defense. Pet. 1a-6a.[8]

### D. Appeal

In a 2-1 decision, the Ninth Circuit reversed, holding that "the class-of-one equal protection theory is not applicable to decisions made by public employers." Pet. 19a. The majority (Tashima and Graber, JJ.) began by offering a distinction between the government acting as a proprietor managing its own internal affairs and as a sovereign making and applying laws and rules to private parties. *Id.* at 23a-24a.

After noting limits on public employee rights under the First and Fourth Amendments, the majority concluded that "[t]he class-of-one theory of equal protection is another area of law where the rights of public employees should not be as expansive as the rights of ordinary citizens." Pet. 25a. The court did not reach the other grounds for Respondents' appeal (*e.g.*, the sufficiency of the evidence as to "similarly situated" employees, and qualified immunity).

Judge Reinhardt dissented. First, he stated that he would have adopted the approach of every other circuit to consider the issue. Pet. 60a-61a. Second, he explained why the majority's failure to allow class-

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[8] Before Engquist's trial in federal court, Corristan sued Respondents in Multnomah County Circuit Court. In November 2003, the jury awarded Corristan $1.1 million in damages. SER 158. The jury found for Corristan, *inter alia*, on her claims that Hyatt and Szczepanski violated her equal protection rights through different treatment without a rational basis for arbitrary, vindictive, or malicious reasons; that Hyatt discriminated against Corristan on the basis of gender or ethnicity; and that Hyatt intentionally interfered with Corristan's employment.

of-one claims in public employment was inconsistent with precedent. *Id.* at 61a-62a. Third, he demonstrated that the majority's concern that the doctrine would eliminate at-will employment was misplaced, explaining that at-will employment did not mean that the "government may freely treat its employees maliciously and irrationally." *Id.* at 61a-62a. Fourth, he showed that the other circuits had avoided a flood of litigation by applying principles that cabined the application of the claim. *Id.* at 65a.

## SUMMARY OF ARGUMENT

I. The Equal Protection Clause contains one simple command: No state shall "deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). These majestic words mean what they say. The Clause does not limit its mandate to "discrete or insular minorities," "fundamental rights," or "suspect classifications"; it protects "persons." This Court has recognized this principle from its pronouncement in *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879), that the Clause "means that no person or class of persons shall be denied the same protection," to its holding in *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000) (per curiam), that a violation of the Clause can exist if a single "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

In holding that "the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees," (Pet. 19a), the divided panel below not only ignored the Constitution's plain text and its interpretation by this Court, it also jettisoned a cardinal rule of

constitutional law. Instead of tailoring a public employee's constitutional right to fit the context, the panel simply decreed that the right did not exist. The panel thereby rejected this Court's approach to public employment, in areas as diverse as free speech, search and seizure, and due process. In each of these areas, this Court has been careful to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). For this reason alone, the decision below should be reversed.

II. Reversal is appropriate for another reason specific to the Equal Protection Clause. This Court has repeatedly held that "strict scrutiny" review is appropriate for racial classifications in the public employment context. It has not distinguished between the public employment and all other settings in the application of strict scrutiny. Yet the Ninth Circuit has now held that a central aspect of the Equal Protection Clause, rational-basis scrutiny, protects only some public employees, some of the time. There are not two Equal Protection Clauses, one for the population at large (providing both strict scrutiny and rational-basis review) and another for public employees (providing only the former). The divided panel below erred in concluding otherwise.

Under the Constitution's text and this Court's doctrine, there is nothing unique about equal protection claims brought by a small group or a single individual, a so-called "class of one." If a *state legislature* enacted a law that singled out a public employee for unequal treatment without any rational basis, that law would violate the Clause despite the narrowness of its application and this Court's trust in the democratic process to remedy imprudent legislative measures. If a *state actor* intentionally

singles out a public employee for unequal treatment without a rational basis, that decision violates the Clause as well.

III. In practice, the weighty burden a plaintiff must shoulder under rational-basis review effectively limits successful class-of-one claims against public employers. In light of the wide range of legitimate government objectives in the workplace, public employers will usually be able to proffer a rational basis for their differential treatment of an employee. Nine circuit courts have recognized class-of-one claims for public employees. None has faced the "flood of litigation" or the parade of horribles imagined by the divided panel below which rewrote the Constitution on grounds of policy.

Instead, these courts of appeals have weeded out insubstantial equal protection claims simply by following this Court's time-honored approach. To succeed, a class-of-one plaintiff must establish "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564. The Court's standard places significant burdens on a plaintiff. She must prove that (1) the public employer acted intentionally; (2) she was treated differently from other similarly situated employees; and (3) the difference in treatment was not rationally related to any legitimate government objective.

Although *Olech* does not require that a class-of-one plaintiff allege that the unequal treatment he received was the result of animus or vindictiveness, several courts of appeals have observed that a plaintiff may need to establish one of these factors to surmount rational basis review. For example, animus may be necessary to show that the

government's unequal treatment was intentional, or that the plaintiff was treated differently from similarly situated employees, or that the government can offer no rational basis for its classification of the employee.

The application of the rational basis test to class-of-one employment plaintiffs by nine different courts of appeals has fulfilled the Clause's guarantee without unduly burdening everyday decisions of government employers. Although class-of-one suits by public employees rarely succeed, in this case a jury specifically found that Engquist carried the burden of proving that the Respondents: (1) "intentionally," (2) treated her "differently than others similarly situated"; (3) "without any rational basis," and (4) "solely for arbitrary, vindictive, or malicious reasons." (Pet. 3a-4a.) The jury's unanimous judgment should be respected.

Equal protection rights should not—and need not—be categorically withdrawn in the public employment setting. The proper path is to leave room for courts to apply the set of tested rules that have proven successful in discouraging frivolous cases, while permitting meritorious ones.

Finally, the Court of Appeals' suggestion that following the Constitution might open "floodgates" is even more attenuated than that argument was in *Olech*. Government officials make millions of zoning and licensing decisions each year, and there has been no flood of class-of-one claims in those contexts. And, as noted, no flood of such claims burdens government employers in the circuits where such claims are allowed. This experience, while not directly relevant to the interpretation of constitutional text, is yet another reason why this Court should reject the speculative reasoning of the Ninth Circuit here.

## ARGUMENT

### I. THE FOURTEENTH AMENDMENT PROHIBITS STATE ACTORS FROM DISCRIMINATING AGAINST INDIVIDUALS WITHOUT A RATIONAL BASIS.

#### A. The Text of the Equal Protection Clause Protects All Persons From Unequal Treatment.

The Equal Protection Clause is simple, clear, and direct: "No state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). The text does not limit itself to certain classes, nor does it exempt public employers from its command. Whoever the state actor and whatever the state action, the Clause demands that government treat all similarly situated persons equally unless there is a rational basis for doing otherwise. See, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564-65 (2000) (per curiam); *Wade* v. *United States*, 504 U.S. 181, 185-87 (1992); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

The Equal Protection Clause thus "protect[s] persons, not groups." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995) (emphasis omitted); see also *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by . . . the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."). The Clause prohibits the government from singling out individuals for harsh treatment without a rational basis, even if no other person falls within the same "classification." *Olech*, 528 U.S. at 564-65. In short, as this Court recently reaffirmed in *Olech*,

the text contemplates that an individual may bring a claim as a "class of one." *Id.*

### B. The History of the Equal Protection Clause Demonstrates That the Clause Was Originally Understood To Protect Individual Persons, Not Just Classes.

*Olech*'s understanding that the Equal Protection Clause protects individuals from discrimination by a state actor is supported by that Clause's history. The Fourteenth Amendment was enacted in large part to support and validate the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which declared that "all persons born in the United States . . . are hereby declared to be citizens of the United States" and that "such citizens, of every race and color, . . . shall have the same right" as others to "make and enforce contracts" and enjoy the "full and equal benefit of all laws and proceedings for the security of person and property." *Id.* § 1. The Civil Rights Act had been passed under the Thirteenth Amendment, which authorized Congress to enforce the constitutional prohibition on slavery through legislation. Cong. Globe, 39th Cong., 1st Sess. 474, 1124 (1866) (statements of Sen. Trumbull and Rep. Cook); see U.S. Const. amend. XIII, § 2. However, when some legislators expressed doubt that the Act could reasonably be construed as a remedy against slavery, its proponents responded by advancing the Fourteenth Amendment, with its broader guarantee of equal protection for all. Cong. Globe, 39th Cong., 1st Sess. 1294, 2465 (1866) (statements of Rep. Wilson and Rep. Thayer); see also *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948).

After adoption of the Amendment, Congress extended the Civil Rights Act's protections not only to "citizens, of every race and color," 1866 Act § 1, but to all "persons," Enforcement Act of 1870, ch. 114, 16

Stat. 140, § 16. This change reflects a broad conception of the Clause as a guarantor of *personal* rights against all forms of invidious discrimination. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695 (1898).

Statements by the Framers underscore the original understanding that the Clause protects individuals against discriminatory treatment. Representative John Bingham, the principal architect of the Clause, emphasized that the constitutional right is "personal" and extends to "every man." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

This Court's decisions, starting from its earliest pronouncements, have consistently embraced these principles. *Missouri* v. *Lewis*, 101 U.S. 22 (1879), which concerned a challenge to state court jurisdictional restrictions, emphasized that the Equal Protection Clause protects both "persons and classes of persons." *Id.* at 30. The Clause "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons *or* other classes in the same place and under like circumstances." *Id.* at 31.

Similarly, in *Barbier* v. *Connolly*, 113 U.S. 27 (1884), the Court held that the Clause

> undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances. . . .

*Id.* at 31.

The Court made the same point in *Atchinson, Topeka & Santa Fe R.R.* v. *Mathews*, 174 U.S. 96, 104-05 (1899):

> [T]he equal protection guarantied by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. . . . Neither can it make a classification of individuals or corporations which is purely arbitrary. . . .

Neither *Lewis* nor *Barbier* nor *Atchinson* uses the phrase "class of one," but all recognize the underlying principle that individuals, not just classes, are entitled to equal protection.

### C. The Fourteenth Amendment Protects Individuals From Unequal Treatment by State Officials and Agencies.

This Court made clear early on that the Equal Protection guarantee protects against discrimination arising not only from a legislative act but also from the conduct of an administrative official. *Ex parte Virginia*, 100 U.S. 339, 347 (1880), held that the Fourteenth Amendment "must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), found that although the law at issue in the case was "fair on its face, and impartial in appearance," it had been "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." *Id.* at 373-74.

At the start of the next century, the Court expressly found the Fourteenth Amendment applicable to all state officials:

> The provisions of the 14th Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state.

*Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907).

In *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U.S. 350 (1918), and *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923), the Court held that higher tax assessments imposed by state officials against a single company, but not against similarly situated businesses, would violate the company's right to equal protection if the disparate treatment was "intentional and arbitrary." *Sunday Lake*, 247 U.S. at 352; accord *Sioux City*, 260 U.S. at 445-47; see also *McFarland* v. *Am. Sugar Ref. Co.*, 241 U.S. 79, 86 (1916). Likewise, in *Snowden* v. *Hughes*, 321 U.S. 1 (1944), the Court recognized that "unequal application" of an otherwise neutral law constitutes a denial of equal protection if it intentionally targets "a particular class or person" or if the state official has a "discriminatory design to favor one individual or class over another." *Id.* at 8. For "the Fourteenth Amendment does not permit a state to deny the equal

protection of its laws because such denial is not wholesale." *Id.* at 15 (Frankfurter, J., concurring).

More recently, in *Allegheny Pittsburgh Coal* v. *County Commission*, 488 U.S. 336, 345-46 (1989), this Court held that state officials' imposition on a landowner of an increased tax burden, not shared by similarly situated landowners, violated equal protection even though the governing statute was neutral on its face. See also *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946); *Nordlinger* v. *Hahn*, 505 U.S. 1, 16 n.8 (1992) ("the protections of the Equal Protection Clause are [not] any less when the classification is drawn by legislative mandate . . . than by administrative action . . . ."); cf. *Esmail* v. *Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (Posner, J.) ("A class of one is likely to be the most vulnerable of all.").

This Court's protection of individuals from discriminatory treatment by government officials has extended well beyond the realms of regulation and taxation. For example, in *Wade*, 504 U.S. 181, a criminal defendant claimed that the prosecutor violated his right to equal protection by failing to move for a reduction in sentence in light of his cooperation. While the Court acknowledged that prosecutors must have wide discretion in such decisions, the Court held the defendant entitled to relief "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id.* at 186. Notwithstanding the obvious potential for abuse, the Court held that the same equal protection analysis in *Sioux City* and *Allegheny Pittsburgh* should apply to cases in other contexts raising a class-of-one claim, even when the government has extremely broad discretion and even when litigants possess the most obvious incentives to litigate.

All these decisions stand for the proposition—reflected in the constitutional text, contemplated by its Framers, and understood consistently by this Court—that the Equal Protection Clause reaches all forms of alleged discrimination by state actors, whether premised on disparate classification of a group or discrimination against a single individual.

### D. *Olech* and Subsequent Precedent Follow From the Text and History of the Fourteenth Amendment.

*Olech*'s holding flowed inexorably from the Constitution's text, its original meaning, and this Court's long history of protecting individuals against unequal treatment by state actors. The plaintiffs in *Olech* were homeowners who claimed that the local government's demand for a 33-foot easement over their property in exchange for a municipal water connection, when other homeowners had been required to provide only a 15-foot easement to receive such services, violated the Equal Protection Clause. 528 U.S. at 563. They alleged that the municipality's differential treatment of them was "irrational and wholly arbitrary," and motivated by ill will, occasioned by prior litigation involving the parties. *Id.* The plaintiffs did not, however, assert membership in a particular group or suggest that the discrimination at issue resulted from a broadly applicable invidious classification. *Id.* at 563-64.

This Court upheld the claim. *Id.* at 564-65. In a per curiam opinion, citing *Sioux City* and *Allegheny Pittsburgh*, it stated: "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* "Whether the complaint

alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis." *Id.* at 564 n.*. Because the complaint in *Olech* alleged intentionally disparate treatment, which was objectively "irrational and wholly arbitrary," this Court allowed the plaintiffs to proceed. *Id.*

*Olech* represents the logical application of this Court's settled precedents. Cases from *Atchinson* through *Sioux City* to *Wade* recognized that whatever the context, intentionally disparate treatment of an individual, no less than discriminatory classification of a group, violates the Equal Protection Clause if it is not rationally related to legitimate state goals. *Olech* simply applied these principles and selected a phrase to describe them: "class of one." See *Cobb* v. *Pozzi*, 363 F.3d 89, 111 (2d Cir. 2003) ("[T]he Supreme Court did not depart from well settled equal protection principles in *Olech*. Rather, the *Olech* Court merely 'reaffirmed' that equal protection claims can be brought by a 'class of one.'" (citations omitted)).

In accordance with *Olech* and its predecessors, the courts of appeals have applied the class-of-one doctrine in a range of contexts. For example, they have applied it to claims by a family alleging that complaints of harassment were ignored because the dispute involved a friend of the police, *DeMuria* v. *Hawkes*, 328 F.3d 704 (2d Cir. 2003); by an individual banned from public gatherings for allegedly lewd dancing when other dancers were allowed to stay, *Willis* v. *Town of Marshall*, 426 F.3d 251 (4th Cir. 2005); by a landowner denied a construction permit when permits were granted to others, *Bell* v. *Duperrault*, 367 F.3d 703 (7th Cir. 2004); and by a real estate developer allegedly denied building

approvals, *Campbell* v. *Rainbow City*, 434 F.3d 1306 (11th Cir. 2006).

None of these opinions even questions whether the Equal Protection Clause applies, despite differences in context from *Olech*. None requires that the plaintiff allege membership in a particular class or group. Rather, all recognize that a valid class-of-one claim arises when the plaintiff is treated differently from others who are similarly situated in relevant respects without a rational basis.

Nine different circuits have applied rational-basis scrutiny to class-of-one claims in the public employment context in the wake of *Olech*.[9] Indeed, some circuits recognized class-of-one claims in the public employment context years before *Olech*.[10] These decisions adhere to the long-established principle that the Equal Protection Clause applies to all forms of discrimination, whatever the context and whoever the actor. See *Nordlinger*, 505 U.S. at 16 n.8; *Wade*, 504 U.S. at 185-87.

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[9] *See Stotter* v. *Univ. of Tex.*, 508 F.3d 812 (5th Cir. 2007); *Scarbrough* v. *Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006); *Hill* v. *Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006); *Whiting* v. *Univ. of S. Miss.*, 451 F.3d 339 (5th Cir. 2006); *Stachowski* v. *Town of Cicero*, 425 F.3d 1075 (7th Cir. 2005); *Neilson* v. *D'Angelis*, 409 F.3d 100 (2d Cir. 2005); *Bizzarro* v. *Miranda*, 394 F.3d 82 (2d Cir. 2005); *Kirby* v. *City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004); *Howard* v. *Columbia Pub. Sch. Dist.*, 363 F.3d 797 (8th Cir. 2004); *Cobb*, 363 F.3d 89; *Wojcik* v. *Mass. St. Lottery Comm'n*, 300 F.3d 92 (1st Cir. 2002); *Hedrich* v. *Bd. of Regents*, 274 F.3d 1174 (7th Cir. 2001); *Giordano* v. *City of New York*, 274 F.3d 740 (2d Cir. 2001); *Bartell* v. *Aurora Pub. Schs.*, 263 F.3d 1143 (10th Cir. 2001); *Hilton*, 209 F.3d at 1005.

[10] *E.g.*, *Ciechon* v. *City of Chicago*, 686 F.2d 511 (7th Cir. 1982); *Zeigler* v. *Jackson*, 638 F.2d 776, 779 (5th Cir. 1981); *Batra* v. *Bd. of Regents*, 79 F.3d 717, 722 (8th Cir. 1996).

Of course, the Clause will be applied differently in different contexts. Employment decisions are influenced by a host of considerations not applicable in other circumstances, meaning that in practice it will likely be more difficult to prove a lack of rational basis for an employment decision. See *infra* Part III. But, regardless of *how* the Clause applies, it always applies.

In any context, whether zoning or criminal prosecution or public employment, the Equal Protection Clause prohibits intentional discrimination against an individual that lacks a rational basis. *Olech*, 528 U.S. at 564; *Wade*, 504 U.S. at 185-87. As we now demonstrate, the Ninth Circuit erred in holding that public employees, alone among those subject to state action, may intentionally be discriminated against without any rational basis for the differentiation whatsoever.

## II. PUBLIC EMPLOYERS ARE STATE ACTORS AND PUBLIC EMPLOYEES ARE "PERSONS" ENTITLED TO "EQUAL PROTECTION OF THE LAWS."

There is no circumstance in which a person absolutely loses his or her rights under the Fourteenth Amendment. See, *e.g.*, *Wong*, 169 U.S. at 695 ("These provisions are universal in their application . . . ."). For every constitutional right that it has considered, including the Fourteenth Amendment, this Court has treated public employers as state actors. This Court has not treated public employment as a constitution-free zone, and has not set aside any provision of the Constitution simply because the state is acting as employer.

This result follows inexorably from the constitutional text: "The fourteenth amendment

imposes constitutional restrictions upon the 'States' as such, not upon the States acting in some capacities and not others." Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1763 (1987). The government as employer still acts as a sovereign, and public employees are still citizens entitled to equal protection of the laws. *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 119 (1992). Instead of reading into the Fourteenth Amendment a distinction that the text does not reveal, this Court has applied the Constitution in this realm to take into account the *"practical realities of government employment,"* *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (plurality), and the important need for "the efficient provision of public services," *Garcetti* v. *Ceballos*, 126 S. Ct. 1951, 1958 (2006).

The divided panel below abandoned this balanced approach. The need for efficiency exists in all arenas of government activity: in virtually every setting, the government must efficiently perform tasks to serve the public interest—in mandating easements, issuing licenses, and enforcing the law. In each instance, the government could conceivably operate more efficiently if its actions were not limited by the Constitution. In each instance, allowing a class-of-one equal protection claim could theoretically give rise to a multitude of claims; after all, governments impose easements, issue licenses, and enforce the law in millions of decisions every day. Yet, the government's interest in efficient operations has not been deemed sufficient justification to set the Constitution aside altogether, as the Ninth Circuit did here. This Court has not found that the government's needs justify completely abandoning

*any* constitutional constraint on the state's actions; it should not do so now.

### A. The Constitution Applies to the Government as Employer.

The government is not exempt from constitutional limitations when it acts as employer. "[S]tate and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 897-98 (1961). See also *Garcetti*, 126 S. Ct. at 1958. Indeed, this Court has recognized that its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick*, 461 U.S. at 147.

This was not always the case. For the first half of the twentieth century, the "unchallenged dogma" was that "a public employee had no right to object to conditions placed upon the terms of employment." *Id.* at 143 (noting the superseded doctrine and collecting cases). Public employees who did "not choose to work on such terms [as set out by the government] . . . [we]re at liberty to retain their beliefs and associations and go elsewhere." *Adler* v. *Bd. of Educ.*, 342 U.S. 485, 492 (1952).

That rule—exempting the government from constitutional restraint in managing its employees—has long since been repudiated. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Bd. of Regents of SUNY*, 385 U.S. 589, 605-06 (1967) (internal quotation marks omitted). It is now firmly established that public employers are

state actors subject to the Constitution in their dealings with employees.[11] For decades, this Court has treated public employers as state actors for purposes of every constitutional claim it has considered.

For instance, in the context of freedom of speech and association, this "Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 126 S. Ct. at 1957; see also *City of San Diego* v. *Roe*, 543 U.S. 77, 80 (2004) (per curiam). Rather, the courts "arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *Connick*, 461 U.S. at 142.

As was once true of this Court's First Amendment jurisprudence, public employees at one time were denied the Fourteenth Amendment guarantee of procedural due process. See, *e.g.*, *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 571 n.9 (1972). It is now clear, however, that public employees are entitled to due process. *Id.*; see also *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 540 (1985); *NCAA* v. *Tarkanian*, 488 U.S. 179, 192 (1988).

Consistent with its modern First Amendment precedent, this Court analyzes the public employee's

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[11] *Compare McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (1892) (Holmes, J.) (a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"), *with Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (stating that "policemen . . . are not relegated to a watered-down version of constitutional rights").

entitlement to due process with consideration for the efficiency concerns and needs of the government employer. This Court assesses whether due process has been denied by balancing "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." *Loudermill*, 470 U.S. at 542-43 (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). But a state action that deprives government employees of liberty or property may nonetheless be "so irrational that it may be branded 'arbitrary,'" and violate the Due Process Clause. *Kelly* v. *Johnson*, 425 U.S. 238, 247-48 (1976).

It is equally settled that the Fourth Amendment's prohibition of unreasonable search and seizures applies to public employers. In *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987), a plurality observed that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." See also *id.* at 730 (Scalia, J., concurring); *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989). The public employer's interests are taken into account when courts assess the reasonableness of the search or seizure. See *id.* at 671.

A similar analysis applies to the Fifth Amendment right against self-incrimination. See *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (the Fourteenth and Fifteenth Amendments "exten[d] to all, whether they are policemen or other members of our body politic"). In each of these contexts, this Court's has accommodated the needs of public employers without giving the government a blank check to make employment decisions, shorn of all constitutional restraint.

This Court has rejected the claims of judges, high executive officials and members of Congress that they are absolutely immune from liability for employment actions. In so doing, the Court has acknowledged that the government interest in effectiveness is counterbalanced by the "salutary effects that the threat of liability can have," and the "undeniable tension between official immunities and the ideal of the rule of law." *Forrester* v. *White*, 484 U.S. 219, 223 (1988). Instead of absolute immunity, the proper balance between the government's interest in effectiveness, and the employee's constitutional rights, is struck by qualified immunity in employment challenges. *Id.* at 230; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813 (1982). Qualified immunity balances rights and itself allows for the disposal of "insubstantial claims without resort to trial." *Id.* at 818. There is, in short, no circumstance in which government employers are or should be absolutely immune from a class of constitutional claims.

Finally, as discussed in the following section, it is axiomatic that the Equal Protection Clause constrains public employers. This Court has expressly recognized that if a public employer intentionally disadvantages a suspect class, the Clause requires strict judicial scrutiny.[12] See, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality); *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979). It necessarily follows that public employers should be treated as state actors for

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[12] There is no fundamental right to government employment for purposes of the Equal Protection Clause. *See Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976) (per curiam).

purposes of class-of-one claims which arise under precisely the same constitutional text.

This Court's jurisprudence thus uniformly treats public employers as state actors for constitutional purposes.

### B. As Is True of All Other Constitutional Claims, Class-of-One Claims May Be Brought Against Government Employers.

Respondents bear a heavy burden. They must show why a single aspect of the Fourteenth Amendment's Equal Protection Clause—class-of-one claims—should be treated differently from every other constitutional right in the public-employment setting. As demonstrated above, this Court's practice is to apply the Constitution to public employers and to address concerns unique to the employment setting by delineating the cause of action to take those concerns into account. There is no basis, either in the text of the Equal Protection Clause or in this Court's cases, to depart from that practice.

As noted, *supra* at 14, the text of the Equal Protection Clause imposes constitutional restrictions on the States without qualification; it does not distinguish the State as "taker" of private property, from the State as "regulator," the State as "law enforcer," or the State as "employer." And, neither the court below nor Respondents have provided any reason for this Court to write this unprecedented proviso into the Clause.

Indeed, this Court has already rejected any such departure. In *Collins*, 503 U.S. 115 (1992), the widow of a sanitation worker who drowned in a sewer line sued under § 1983, claiming that the city violated her husband's liberty interests by not properly training

and warning regarding the risks of working in sewers. This Court rejected the court of appeals' distinction between a government acting as a sovereign with respect to a citizen and a government acting as a manager with respect to an employee:

> The Court of Appeals' analysis rests largely on the fact that the city had, through allegedly tortious conduct, harmed one of its employees rather than an ordinary citizen over whom it exercised governmental power. The employment relationship, however, is not of controlling significance. . . . *The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them,* and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections. Neither the fact that petitioner's decedent was a government employee nor the characterization of the city's deliberate indifference to his safety as something other than an "abuse of governmental power" is a sufficient reason for refusing to entertain petitioner's federal claim under § 1983.

*Id.* at 119 (emphasis added). *Collins* makes clear that the fact that a government acts as an employer (rather than a sovereign) may affect the balancing of constitutional interests, but it does not transform state action into something else or nullify the application of the Constitution. *Collins*' analysis alone mandates reversal of the decision below.

In addition, this Court has already recognized that the Equal Protection Clause protects a public employee, who is not part of any specially protected class, from irrational treatment by her public

employer. *Harrah Indep. Sch. Dist.* v. *Martin*, 440 U.S. 194 (1979). Martin, a teacher, was dismissed by the school board because she (along with three colleagues) did not comply with a continuing-education requirement. Because Martin "neither asserted nor established the existence of any suspect classification or the deprivation of any fundamental constitutional right," the Court found "the only inquiry is whether the State's classification is rationally related to the State's objective." *Id.* at 199 (internal citations and quotation marks omitted). Although this Court ultimately concluded that Martin was not "deprived of equal protection of the laws" because the school board's action was rationally related to a legitimate objective, *id.*, the critical point here is that this Court never questioned that the Equal Protection Clause protected Martin against irrational and unequal treatment at the hands of her public employer.

*Martin* and *Collins* share the same premise as *Olech*: The Clause protects persons from irrational or arbitrary state discrimination. This Court has repeatedly characterized its cases addressing constitutional claims subject to heightened scrutiny as forbidding arbitrary or irrational treatment of such employees, using the same language *Olech* uses to describe a class-of-one claim. See *Cafeteria Workers*, 367 U.S. at 897-98 ("We may assume that [the public employee] could not constitutionally have been excluded from [her workplace] if the announced grounds for her exclusion had been patently arbitrary or discriminatory . . . ."); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952) ("It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.").

Furthermore, in cases raising public employees' constitutional claims that do *not* call for strict scrutiny, this Court has employed the same formulation. See *Murgia*, 427 U.S. at 313; *Rutan* v. *Repub. Party of Ill.*, 497 U.S. 62, 98 (1990) (Scalia, J., dissenting) ("When dealing with its own employees, the government may not act in a manner that is 'patently arbitrary or discriminatory,' but its regulations are valid if they bear a 'rational connection' to the governmental end sought to be served.") (citations omitted).

In sum, this Court has held, repeatedly, that public employers are bound by the Equal Protection Clause for purposes of both strict scrutiny and rational-basis review. The text, history, and precedent interpreting the Clause prohibit exempting government employers alone from class-of-one liability.

### C. The Ninth Circuit's Decision Should Be Reversed Because It Wrongly Equates Public and Private Employment.

In seeking an exception to the Court's usual practice of considering the employment setting as a factor in how (and not whether) to apply the Constitution to the state as employer, both Respondents and the divided panel below asserted that the state is not acting as a sovereign when it acts as employer. As demonstrated above, this view is plainly inconsistent with this Court's precedent.

Further, even when acting as an employer, the government remains the sovereign, capable of relating to its employees in ways that are impossible for private employers. For example:

- No private employer has the power to legislate the terms and conditions of employment for its employees, removing

their susceptibility to negotiation.

- No private employer has the power to enact a law forbidding strikes by employees holding particular positions critical to the company and to the public interest. But see Or. Rev. Stat. § 243.736 (2007).
- No private employer can fund its retiree benefits plans and programs with the public fisc. But see Or. Rev. Stat. § 238A.025 (2007).
- No private employer is entitled to sovereign immunity. In contrast, sovereign immunity ordinarily bars damages suits against states, even when important federal laws are at issue. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 732-33 (1999); *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that the Age Discrimination in Employment Act does not abrogate sovereign immunity); *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001) (holding that Title I of the Americans with Disabilities Act does not abrogate sovereign immunity).

Public employees' constitutional rights have never been abrogated in their entirety; they are, at most, qualified in some respects. Just as "[c]onstitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer," *O'Connor*, 480 U.S. at 731 (Scalia, J., concurring), constitutional protection against illegitimate discrimination does not disappear merely because the government has the right to make rational decisions in its capacity as employer.

The Ninth Circuit ignored the fundamental distinction between limiting a constitutional right and eliminating it altogether. In an attempt to support its conclusion by analogy to the First and Fourth Amendment contexts, the Ninth Circuit recognized that "the Court has *limited* the rights of public employees as compared to ordinary citizens." Pet. 24a (emphasis added). Then, however, the panel abruptly transformed "limited" into "eliminated," thereby stripping public employees of the right of "every person within the State's jurisdiction" to be secure "against intentional and arbitrary discrimination." *Olech*, 528 U.S. at 564 (citation omitted).

Neither the text of the Equal Protection Clause nor this Court's cases suggest that public employers may intentionally, arbitrarily, and irrationally treat similarly situated persons differently. The Fourteenth Amendment exists as a limitation on state action, see *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 924 (1982), irrespective of the capacity in which the state acts.

Rather than eliminating constitutional constraints on states when they act as employers, this Court should do what it has done with respect to all other constitutional rights in the context of public employment—carefully delineate the class-of-one cause of action to protect the relevant government interests and the employee's constitutional rights.

## III. PROPER APPLICATION OF RATIONAL BASIS REVIEW APPROPRIATELY LIMITS CLASS-OF-ONE CLAIMS BY PUBLIC EMPLOYEES.

Traditional class-of-one equal protection analysis requires a plaintiff to show that a public employer

has intentionally treated similarly situated employees differently for reasons that are not rationally related to any legitimate government interest. This requirement appropriately limits class-of-one claims, fully accommodates the government's interests as employer, and deters inappropriate and irrational government conduct that ill-serves the public's interest in fair and efficient government.

### A. Plaintiffs Bear the Significant Burden of Proving Each Element of a Class-Of-One Claim.

To make out a successful class-of-one claim, a plaintiff must establish that: (1) the government treated him or her differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) the difference in treatment was not rationally related to any legitimate government purpose. See *Olech*, 528 U.S. at 564.

Each element of this claim is a significant hurdle for plaintiffs asserting class-of-one claims, and all must be satisfied for the plaintiff to prevail. Experience with such claims in the federal courts demonstrates that it is difficult for plaintiffs to prove the elements of a class-of-one claim; only a handful of such claims have succeeded. The cause of action itself, and the difficulties plaintiffs face in proving each element, inherently limit the number of successful class-of-one cases and ensure that run-of-the-mill government employment decisions will not be subjected to constitutional scrutiny. See *Cordi-Allen* v. *Conlon*, 494 F.3d 245, 255 (1st Cir. 2007) ("The *Olech* class of one suit serves an important but relatively narrow function. It is not a vehicle for federalizing run-of-the-mill zoning, environmental, and licensing decisions.").

### 1. The Plaintiff Must Prove That the Government's Differential Treatment Was Intentional.

To begin, a plaintiff making a class-of-one equal protection claim must demonstrate that the government's differential treatment of him or her was intentional—not the result of chance, mistake, or careless error. Mere differences in treatment cannot form the basis of a claim: the government must have deliberately differentiated between like individuals. This element of the cause of action emerges directly from *Olech*. See 528 U.S. at 564.

*Olech*'s intent requirement flows from this Court's decision in *Snowden* to limit the government's liability in cases involving unintended error. In *Snowden*, the Court explained that "an erroneous or mistaken performance of [a] statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws." 321 U.S. at 8. Rather, an additional requirement is the "element of intentional or purposeful discrimination." *Id.*

Similarly, in *Sunday Lake*, 247 U.S. 350, this Court recognized that the Equal Protection Clause does not prohibit unequal taxation that results from an honest mistake. See also *Ciechon* v. *City of Chicago*, 686 F.2d 511, 522, 523 (7th Cir. 1982) (equal protection "does not mean that error or mistake in the application of the law gives rise to an equal protection claim," but "[r]ather, [when] it was an intentional act with no rational basis").[13] In this case,

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[13] For example, *Giordano*, 274 F.3d 740, rejected a challenge to retire a police officer as disabled "because of his regimen on the drug Coumadin." *Id.* at 742. While the plaintiff showed that the department retained another officer taking Coumadin, the plaintiff presented "no evidence . . . that those responsible

the jury found, and Respondents have never disputed, that their treatment of Engquist was intentional.

### 2. The Plaintiff Must Prove That He or She Was Treated Differently From Other Similarly Situated Persons.

A class-of-one plaintiff must also establish that he or she was treated differently from others similarly situated in relevant respects. *Olech*, 528 U.S. at 564. This requirement screens out cases that involve no genuine discrimination, while permitting cases that do.

The courts of appeals have scrupulously applied the "similarly situated" requirement to require class-of-one plaintiffs to establish significantly unequal treatment, eliminating *de minimis* and insubstantial claims. See, *e.g.*, *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006) (rejecting class-of-one claim where public employee could not point to similarly-situated employees); *Neilson* v. *D'Angelis*, 409 F.3d 100, 106 (2d Cir. 2005) (factual comparison to comparators "too remote" to support similarity).

The First Circuit's application of this condition highlights its limiting effect in the public-employment context. "Plaintiffs claiming an equal protection violation must first identify and relate specific instances where persons situated similarly *in all relevant aspects* were treated differently." *Rubinovitz* v. *Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (internal quotation marks omitted; emphasis added). See also *Buchanan* v. *Maine*, 469 F.3d 158, 178 (1st Cir. 2006) (finding that, although "an exact

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for terminating him because of his Coumadin use knew they were treating him differently from anyone else." *Id.* at 751.

correlation need not exist between a plaintiff's situation and that of others," the claim failed because no comparators were similarly situated (internal quotation marks omitted)); *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004); *Griffin Indus., Inc.* v. *Irvin*, 496 F.3d 1189, 1203-04 (11th Cir. 2007).

Only where the plaintiff can present evidence that the government has treated unequally people who are similarly situated in the respects relevant to the differential treatment will a class-of-one claim be permitted to proceed. See *Zeigler*, 638 F.2d at 779;[14] *Ciechon*, 686 F.2d at 522-23. This principle captures the essence of the equal protection violation, namely, the government's treatment of similar people in different ways without a rational basis for the discrimination. In this case, the jury explicitly found that the government singled Engquist out for harsher treatment than the similarly situated individuals in the LSD. Pet. 3a-4a.

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[14] In *Zeigler*, a police department discharged a patrolman pursuant to a "character requirement" following his convictions for presenting a firearm and criminal provocation, 638 F.2d at 777. In his challenge, the plaintiff presented evidence of "at least three individuals . . . retained on the police force following their convictions" of similar crimes. *Id.* at 779. Given the similarity of the offenses and the fact that all officers were "equally subject to the character requirement" and its offense list, they were similarly situated. *Id.* That was so despite any number of differences between the three officers in their employment and personal characteristics; the inquiry properly focused only on whether those individual characteristics were relevant to the state's proffered rationale for its action.

### 3. The Plaintiff Must Establish That The Unequal Treatment Is Not Rationally Related to a Legitimate Government Purpose.

The third element of class-of-one claims requires a plaintiff to demonstrate that the government's intentional discrimination was without a legitimate basis. This Court has explained that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Cent. State Univ.* v. *Am. Ass'n of Univ. Professors*, 526 U.S. 124, 127-28 (1999) (internal quotation marks omitted).

"Rational basis" review is premised on the judicial deference due to governmental policy decisions resulting from democratic processes, see, *e.g.*, *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938). Yet, this Court's jurisprudence has consistently reaffirmed that state action against a nonsuspect class fails even this relaxed scrutiny if, *inter alia*, the classification is based on an "irrational prejudice" rather than legitimate governmental interests, see, *e.g.*, *Cleburne*, 473 U.S. at 447-50, or if the asserted policy reason for the justification is not "plausible," see, *e.g.*, *Nordlinger*, 505 U.S. at 11.

In rational-basis cases, the plaintiff must overcome a strong presumption in favor of the government. *Hodel* v. *Indiana*, 452 U.S. 314, 331-32 (1981). To be sure, the plaintiff always has an opportunity to negate the government's asserted bases for its discriminatory classification or treatment. If the reasons the government puts forward for treating an individual unequally reveal an illegitimate purpose,

or are not rationally related to the proffered objective, then the plaintiff can prevail.

In *Cleburne*, for example, this Court invalidated the application of an ordinance requiring a home for the mentally disabled to obtain a "special use permit" before constructing a new facility. See 473 U.S. at 450. The plaintiffs prevailed by establishing that each of the defendant city's asserted rationales for the discriminatory treatment was either unrelated to a legitimate objective or was based on an illegitimate purpose. This Court concluded that the classification bore no rational relationship to more legitimate government objectives, such as concerns about overcrowding or the possibility of a flood. *Id.* at 449-50.

The Equal Protection Clause is a guarantee against discriminatory treatment, not adverse government actions (unless they affect fundamental rights).[15] Thus, equal protection analysis does not focus on whether the government had a rational basis for harming someone—instead it focuses on whether the

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[15] For this reason, cases in which this Court has refrained from recognizing certain Due Process Clause rights for public employees, *e.g.*, *Collins*, 503 U.S. 115; *Bishop* v. *Wood*, 426 U.S. 341 (1976), bear no relation to the guarantee the Equal Protection Clause provides against intentional discriminatory treatment at the hands of government actors. Although the Due Process Clause only protects against the deprivation of discrete recognized interests, the Equal Protection Clause applies to all persons, whether or not they are part of a special class or exercising a special right. Unlike the plaintiffs in *Bishop* and *Collins*, Engquist does not seek recognition of a special right, nor does she ask the courts to impose any novel duty on public employers. And unlike the plaintiffs in these Due Process Clause cases, Engquist does allege—and a jury found—that she was treated differently from similarly situated individuals, and discriminated against irrationally by the government.

government had a rational basis for harming one person and not another. As *Olech* explains, this Court's "cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is *no rational basis for the difference in treatment.*" 528 U.S. at 564 (emphasis added). For this reason, an equal protection plaintiff need not establish that the government had no rational basis for taking action against her. But the plaintiff is required to prove that the government had no rational basis for taking action against her *as opposed to somebody else* similarly situated.

A governmental employment decision is thus rational whenever the discrimination relates to a legitimate government interest. *E.g.*, *Bizzarro* v. *Miranda*, 394 F.3d 82, 89 (2d Cir. 2005). In practice, it has been difficult for plaintiffs to show that the government has failed to meet this standard, particularly in the context of public employment. For example, the courts of appeals have noted that a government employer's disciplinary decision is rationally related to a legitimate government purpose where the employee violated an established rule or policy. See *Wojcik*, 300 F.3d at 105; *Lauth* v. *McCollum*, 424 F.3d 631, 634 (7th Cir. 2005). Only an arbitrary governmental deviation from established policy undermines the rationality of the government's proffered basis for action. See *Zeigler* v. *Jackson*, 638 F.2d 776, 779 (5th Cir. 1981).

The rationality of a government employment decision relying on either an employee rule violation or a legitimate government purpose reduces the universe of potentially irrational government decisions. Accordingly, court conclusions of

irrationality have been largely confined to cases in which the plaintiff employee demonstrates animus or improper motive on the part of the government decision-maker. See *Scarbrough*, 470 F.3d at 261; *Ciechon*, 686 F.2d at 516.

These principles, at the heart of rational basis review, have effectively limited the number of class-of-one cases. The Equal Protection Clause does not require perfect equality in treatment for all similarly situated individuals. Instead, a plaintiff must prove that the government's discrimination is not rationally related to a legitimate government purpose, a showing possible for only that tiny fraction of plaintiffs who have suffered intentional, irrational, and discriminatory government treatment. In this case, Engquist alleged malice and the jury can be said to have credited her evidence that she was discriminated against because of Respondents' ill-will instead of a legitimate government purpose.

### 4. The Presence of Animus, Ill-Will, Malice, or Vindictiveness.

If the government is unable to articulate a rational basis for discriminating against an individual plaintiff, it follows that the government's discrimination was either arbitrary or motivated by animus.

In *Cleburne* itself, after negating the proffered rationales, this Court emphasized that the city's decision "appears to us to rest on an irrational prejudice." 473 U.S. at 450. In other words, rather than looking behind the record to evaluate the subjective intent of the city's decision to require a "special use permit," the Court concluded that the city's offered justifications were facially unconvincing. See, *e.g.*, *id.* (noting that the city's interests in

"avoiding concentration of population" and "lessening congestion of the streets . . . obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit").

Like *Cleburne*, this Court's decision in *Olech* did not require a plaintiff to allege animus. *Olech*, 528 U.S. at 565 (permitting claim due to allegations of "irrational and wholly arbitrary" government action, without reaching "the alternative theory of 'subjective ill will' relied on by [the lower] court"). Justice Breyer's concurring opinion nonetheless viewed allegations of "'vindictive action,' 'illegitimate animus,' or 'ill will'" as sufficient to state a class-of-one claim. *Id.* at 566 (Breyer, J., concurring in the result). Following Justice Breyer, several courts, including the trial court in this case, have looked to animus or vindictiveness in assessing class-of-one violations.

Proof of animus need not, however, be an independent, additional factor in class-of-one cases. Rather, courts use evidence of malice and vindictiveness as a proxy for other elements that a plaintiff must prove. Given the potential value of evidence of animus in reducing the likelihood of elevating innocuous government mistakes to constitutional issues, courts have looked to evidence of animus and vindictiveness as probative of (1) whether the classification is rationally related to a legitimate government purpose, (2) the existence of similarly situated comparators, and (3) the intentional nature of the governmental discrimination.

For example, in *Scarbrough*, 470 F.3d 250, the Sixth Circuit relied on evidence of improper animus undergirding a governmental employment decision to

establish the irrationality of the government action. In that case, the defendant board of education refused to rehire the plaintiff as the director of schools after plaintiff was asked to speak at a church convention with "a predominantly gay and lesbian congregation." *Id.* at 253-54. Reviewing the board's differential treatment of the plaintiff, as compared to the successful candidate, for "rationality," the court noted that "[t]he desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose." *Id.* at 261 (citation omitted).

Noting that a "plaintiff may demonstrate that the government action lacks a rational basis either [1] by negativing every conceivable basis which might support the government action, or [2] by demonstrating that the challenged government action was motivated by animus or ill-will," *id.* at 261 (citation omitted), the court concluded that the plaintiff "offered sufficient evidence to create a genuine issue of material fact as to whether [board members] were motivated by animus against homosexuals." *Id.*

Similarly, the First Circuit has viewed evidence that the governmental decision was motivated by vindictiveness or animus as relevant to the requirement that the plaintiff be treated differently from others who are similarly situated. See *Cordi-Allen*, 494 F.3d at 251 n.4 ("We note that the degree of similarity required may be relaxed somewhat if the plaintiff has presented evidence of personal malice and bad faith retaliation." (internal quotation marks omitted)). Otherwise, a class-of-one plaintiff would face greater difficulty in establishing a claim where the plaintiff produced significant evidence of animosity underlying the government action, because that animosity would itself distinguish the plaintiff

from potentially similarly situated comparators. See *U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991) ("[w]e generally accord . . . official conduct a presumption of legitimacy"); *United States* v. *Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.")

Moreover, a plaintiff's evidence of vindictiveness or malice can be used to demonstrate that the mere act of discrimination was committed intentionally. In class-of-one challenges to governmental regulation, the regulation itself might give rise to an inference of improper motive, but in the employment context the plaintiff may need to demonstrate personal vindictiveness or malice in order to prove that the unequal treatment was intentionally directed at her. Indeed, although subjective intent has little—if anything—to contribute to analysis of whether particular legislation is "rational," it understandably plays a greater role in assessing the propriety of governmental *employment* decisions. See, *e.g.*, *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52 (2003) (noting the reliance upon subjective intent in employment cases alleging disparate treatment).

Here, as in *Olech*, this Court need not decide as a general rule whether proof of malicious or vindictive conduct is necessary in order to state a class-of-one claim. It would suffice merely to adopt the principle, as have so many courts of appeals, that a finding of animus is highly relevant to establishing the elements required to prove an equal protection violation.

### 5. The Jury Found the Government's Different Treatment of Engquist to Be Without Any Rational Basis.

Because plaintiffs face significant hurdles in proving a class-of-one claim, as established in *Olech*, allowing plaintiffs to bring such claims does not substantially burden the day-to-day administration of government, but it does protect individuals from the rare circumstance in which the government discriminates without a rational basis. Although it is difficult for a plaintiff to overcome the rational basis test, it is not impossible. See, *e.g.*, *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) (invalidating a New Mexico tax exemption because there was no reason for the state to "prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit"); see also *Allegheny Pittsburgh*, 488 U.S. at 345-46.

In *Olech* itself, this Court found that the Village lacked a rational basis for requiring the respondents to cede it a 33-foot easement in exchange for connecting their property to the municipal water supply when similarly situated property owners were asked only for 15-foot easements.

Here, the district court properly instructed the jury on all of the elements Engquist needed to prove to win her class-of-one equal protection claim. Pursuant to the judge's instructions, the jury found in this case that (1) "the acts . . . of the defendants were intentional," (2) the plaintiff "prove[d] that defendants treated her differently than others similarly situated," (3) "the different treatment caused the denial of Plaintiff's promotion, the exercise of her bumping rights or the termination of her employment," (4) "no rational basis exists for the difference in treatment," and (5) "Defendant took

these actions for arbitrary, vindictive, or malicious reasons." JA 63-64. By finding each of these factors, the jury's verdict places Engquist's case in the small set of cases in which plaintiffs are able to prove that unequal treatment at the hands of the government is not rationally related to a legitimate government purpose.

### B. Employees' Class-of-One Claims Are Inherently Limited by the Wide Array of Public Employers' Legitimate Objectives.

For a class-of-one claim to succeed, the plaintiff must establish that the government's discrimination was not rationally related to a legitimate government purpose. In practice, this has proven a high hurdle for plaintiffs to clear, especially in the public-employment setting, in which government has a wide array of legitimate interests that justify differential treatment of employees.

Indeed, the range of legitimate government objectives is likely to be far greater in the employment context than in others. For example, a government employer, like a private employer, has a legitimate interest in retaining a competent and professional workforce and promoting collegiality in the workplace. Accordingly, the government employer generally can reasonably terminate an individual on the basis that he or she lacks adequate knowledge of the relevant subject matter or is antisocial or insubordinate. It follows that public employees will have fewer opportunities to bring a valid class-of-one claim than citizens subject to other government action.

For example, it would not be rationally related to a legitimate government objective for a zoning official

to deny a home permit to an individual based on the official's belief that the individual was antisocial. In contrast, for an agency to terminate an employee for the same reason generally would relate rationally to a legitimate interest of a government employer. Unlike the zoning official, the public employer often must take into account the individual personalities and interpersonal relationships of employees in the workplace. The close relationship between the employer and employee, and the varied needs and interests involved in the employment context, mean that considerations such as concerns over personality conflicts that would be unreasonable as grounds for "arm's-length" government decisions (*e.g.*, zoning, licensing) may well justify different treatment of a public employee.

Public employers in different fields have cited to a vast array of specific legitimate objectives in the courts of appeals. In *Bizzarro*, for instance, a corrections officer refused to assist his superiors in conducting an internal prison investigation into the shipment of contraband into the facility. 394 F.3d at 83. The court concluded that the ensuing disciplinary charges were "rationally related" to the department's legitimate need to eliminate contraband. *Id.* at 88-89. The rationality of a government decision relying on either an employee rule violation or a legitimate policy interest further reduces the universe of potentially illegitimate government decisions.

Still, not all public employment decisions will be related to a "legitimate" government objective. See *Scarbrough*, 470 F.3d at 261 ("animus against homosexuals can never be a legitimate governmental purpose"); *Cleburne*, 473 U.S. at 446-47 ("[S]ome objectives—such as 'a bare . . . desire to harm a politically unpopular group,'—are not legitimate state

interests.") (citation omitted). If an employee is discriminated against for having some particular personal characteristic unrelated to workplace efficiency, or belonging to some unpopular group, this does not serve a legitimate government objective. So too, it serves no legitimate interest of the government if an employee is discriminated against for whistle-blowing, or because a boss has been bribed to hire somebody else.

Nonetheless, the wide range of legitimate bases for discriminatory treatment that are unique to the employment relationship places firm limits on class-of-one employment cases.

### C. Public Employers Have Been Subject to Rational-Basis Review For Years With No Ill Effects.

Both before and since *Olech*, circuit and district courts have applied a variety of principles that limit the field of class-of-one public employment cases. Such claims have placed no strain on the docket.

In the seven years since *Olech* was decided, only 162 reported public employment cases—approximately 24 cases per year—even *asserted* an *Olech* class-of-one equal-protection violation in federal court. All but a handful were disposed of via summary judgment or a motion to dismiss. These small numbers are dwarfed by the large number of employment suits filed every year. In fiscal year 2006, there were nearly 15,000 claims of employment discrimination filed in federal court alone. *Judicial Business of the United States Courts, 2006 Annual Report of the Director*, available at http://www.uscourts.gov/judbususc/judbus.html. The relatively small number of class-of-one public employment cases filed over the course of seven

years—even though no circuit (until now) has held them invalid—demonstrates that applying this doctrine to public employment has not led, and will not lead, to a flood of litigation.[16]

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[16] The Ninth Circuit's decision was driven in part by concern that allowing class-of-one claims by public employees would "invalidate the practice of public at-will employment." Pet. 25a. This concern is misplaced for several reasons.

First, "[i]t is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration," *Rutan*, 497 U.S. at 80 (Stevens, J., concurring)—here, a violation of the Equal Protection Clause. *"There is a clear distinction between the grant of tenure to an employee—a right which cannot be conferred by judicial fiat—and the prohibition of a discharge for a particular impermissible reason."* *Id.* at 80-81 (emphasis added) (citations omitted).

Second, as noted *supra*, a class-of-one claim must be based on *intentional* conduct and differential treatment of similarly situated employees. A public employer, accordingly, can terminate or discipline an at-will employee "without cause" if its conduct is not intentional and if there is no differential treatment of similarly situated employees.

Third, the Ninth Circuit's prediction is devoid of practical support. Nine circuits permit such claims, and there is no flood of class-of-one claims—let alone successful claims—by formerly at-will employees.

Finally, the Ninth Circuit's quotation of *Waters*, 511 U.S. at 679, for the proposition that "an at-will government employee . . . generally has no claim based on the Constitution at all," misreads the decision. In *Waters* itself, the Court granted all public employees—whether at-will or not—a right to sue their employers for violations of First Amendment rights. See *id.* at 678. This Court has made clear that at-will employees may bring constitutional claims against their public employers. *E.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 599 (1972) (although at-will employment status is "highly relevant to [an employee's] procedural due process claim[,]" a "lack of formal contractual or tenure security in continued employment . . . [is] irrelevant to his free speech claim"). In sum, there is no need to

In comparison to the numerous avenues into courts already available to plaintiffs in employment disputes—any of which may permit extensive discovery—it is difficult to envision a circumstance in which the class-of-one claim would seriously alter the current litigation balance in the trial courts.

Public employees who are members of no special class can still allege substantive and procedural due process violations, retaliation in violation of the First Amendment, and a variety of other claims.[17] And no matter what the race or gender of a public employee may be, that employee can allege discrimination (or so-called "reverse discrimination") under § 1983—with its accompanying *heightened* scrutiny, which will undoubtedly be more attractive to litigants than the deferential "rational basis" standard.

This case amply demonstrates the point: Ms. Engquist asserted statutory and substantive due process violations in addition to her equal-protection claim. Even if Ms. Engquist had no class-of-one equal-protection claim, discovery in her case would have proceeded, and the case would have gone to trial. JA 36 ("The court finds that this evidence is sufficient to create an issue of fact as to whether defendants were motivated to terminate plaintiff for discriminatory reasons" in violation of Title VII.); *id.* at 40-41 (denying government's motion for summary judgment with respect to substantive due process claim). See also *Gilbert* v. *Homar*, 520 U.S. 924, 929-

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eliminate the constitutional right to equal protection for public employees to preserve at-will public employment.

[17] Other statutory and constitutional causes of action available to public employees are no substitute for their right to equal protection. *Bd. of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996). Each constitutional provision guarantees discrete rights.

31 (1997) (suggesting that the Due Process Clause protects against disciplinary measures short of termination).

Of the 162 public employment cases filed over the past seven years alleging a class-of-one equal protection violation, the vast majority asserted other causes of action as well. Thus, curtailing the equal-protection rights of a class-of-one public employee would do little, if anything, to reduce the caseload of the federal courts.[18]

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[18] Allowing a cause of action for Ms. Engquist, a state employee, would not automatically create a class-of-one remedy for federal employees, whether at-will or not. Congress has provided a statutory cause of action, 42 U.S.C. § 1983, to remedy constitutional violations committed by state and local officials. *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). However, no similar statute provides a general cause of action to remedy constitutional violations committed by federal government officials. *See Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). In *Bivens*, this Court suggested that it would not craft a cause of action for a constitutional violation by the federal government if the plaintiff had available another remedy, "equally effective in the view of Congress." 403 U.S. at 397. This Court first applied that exception in *Bush* v. *Lucas*, 462 U.S. 367 (1983), where in light of extensive federal civil service protections it declined to create a cause of action for a constitutional suit by a federal employee against his public employer. A similar analysis would be applicable here.

In contrast to cases concerning the availability of a *Bivens* remedy, as a general rule this Court does not consider the availability of state laws and procedures for substantive constitutional claims brought under § 1983. *Monroe*, 365 U.S. at 183. In the limited context of procedural due process cases, this Court does consider available state law remedies to determine whether a constitutional violation has occurred, for a deprivation of life, liberty, or property "is not complete unless and until the State fails to provide due process." *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990); *see also Parratt* v. *Taylor*, 451

Moreover, federal courts have available a range of procedural tools to prevent meritless cases from moving forward and clogging up the courts. For example, through the requirements of Federal Rule of Civil Procedure 8 or other mechanisms under the Federal Rules of Civil Procedure (such as Rule 56(f)), courts can require plaintiffs to plead and produce evidence of the facts that support a class-of-one claim. Indeed, this Court has recently clarified that, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1974 (2007).

In practice, accordingly, a plaintiff cannot just plead the legal elements of a class-of-one claim without more, but must also plead facts sufficient to demonstrate that each element of his or her claim has been satisfied in the public employment setting. See *id.* at 1965 ("[F]ormulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level."). Thus, when faced with a class-of-one complaint that fails to make plausible factual allegations that the government's action was

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U.S. 527, 531-35 (1981); *Hudson* v. *Palmer*, 468 U.S. 517, 522-30 (1984). Thus, in that one "special" category of cases, "to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon*, 494 U.S. at 125.

When suits concern substantive constitutional rights, though, "the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Id.* (citations omitted); *see also Collins*, 503 U.S. at 119-20 ("[T]he Equal Protection . . . Clause[] . . . afford[s] protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of [it].").

irrational and intentional, the lower courts can dismiss the case under Rule 12(b)(6). See *Ass'n of Cleveland Fire Fighters* v. *City of Cleveland*, 502 F.3d 545, 548-50 (6th Cir. 2007) (applying *Twombly* to class-of-one claim and concluding that plaintiffs raised insufficient factual allegations to "raise a right to relief above the speculative level" (quoting *Twombly*, 127 S. Ct. at 1965)); *Phillips* v. *County of Allegheny*, No. 06-2869, 2008 WL 305025 (3d Cir. Feb. 5, 2008) (discussing in detail pleading requirements for class-of-one equal protection claims, and noting *Twombly*).

Other mechanisms provided by the Federal Rules of Civil Procedure also allow courts to dispose of meritless class-of-one cases quickly. For example, prior to discovery, "the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e)." *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998); see also *Schultea* v. *Wood*, 47 F.3d 1427, 1432-33 (5th Cir. 1995) (en banc) (upholding the district courts' power in qualified-immunity cases to order a reply pleading far greater detail than that required by Rule 8(a)(2)).

The combination of the substantive elements of a class-of-one cause of action and certain tools embodied in the Federal Rules of Civil Procedure allows courts to address such claims, while balancing the equal protection rights of public employees with the appropriate discretion governmental employers have in making employment decisions. And, in fact, this is what has happened. The Ninth Circuit's unsubstantiated speculation that allowing class-of-one claims will overwhelm the federal courts and public employers with litigation is proven wrong by

the courts' actual experience in the nine circuits where such claims have been authorized.[19]

Finally, there is no reason to believe that more and more insubstantial class-of-one claims will arise in the public-employment context than in other government settings, such as the land-use context addressed in *Olech*. State and local governments make millions of zoning and licensing decisions each year.[20] State and local prosecutors make hundreds of

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[19] Notably, the rational-basis standard that applies to class-of-one claims is virtually identical to the standard this Court applies in assessing whether a union—which has both a statutory duty to represent its members and an obligation to "govern" in the overall interest of the bargaining unit as a whole—has breached its duty to individual members. In balancing these interests, this Court has held that "a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith,'" and "that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational.'" *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted). Negligence is not enough. *United Steelworkers* v. *Rawson*, 495 U.S. 362, 372 (1990). Like unions, public employers have government and public interests to serve—interests that must be balanced against employees' rights not to be intentionally treated arbitrarily or irrationally. The Court designed its fair-representation test to balance the relevant interests, and it has proven wholly workable. There is no reason why class-of-one claims would be any different.

[20] "[Z]oning decisions . . . occur thousands of times every day in this country." *Lemke* v. *Cass County*, 846 F.2d 469, 471 (8th Cir. 1987) (Arnold, J., concurring). There were over 1.8 *million* building permits issued for new construction in 2006. U.S. Census Bureau, *Building Permits-Annual Data*, available at http://www.census.gov/const/bpann.pdf.

Oklahoma issued 3 million licenses in fiscal year 1998, including over 1 million business licenses. Marie Price, *New*

thousands more.[21] And prisons and jails similarly make millions of individualized decisions each year. In many of these contexts, a plaintiff can assert that the government is behaving improperly, and file a federal lawsuit to, for example, strike down a housing inspection failure, reinstate a liquor license, undo a plea agreement, or contest the imposition of prison discipline.

While the wholesale elimination of constitutional rights would certainly cut the number of federal cases, that course is both impermissible and unnecessary. Instead, the discretion built into rational-basis review, coupled with the traditional tools that federal courts have employed to manage such cases, reserves the class-of-one claim for appropriate cases of irrational and arbitrary government conduct. Public employees, who after all serve our citizenry, should have the same rights as the variety of other persons whose ability to bring rational-basis challenges has been affirmed by this Court.

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*Law Aimed at Licensing Businesses*, Journal Record, June 30, 1998.

New York's Division of Alcoholic Beverage Control "regulates nearly 70,000 licenses and permits statewide each year." *See* N.Y. State, Div. Alcoholic Bev. Control, *Licensing Information*, available at http://abc.state.ny.us/JSP/content/licensing.jsp.

[21] Approximately 95% of the 1,078,920 convicted state felons in 2004 pled guilty. *See* Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, available at http://www.albany.edu/sourcebook/pdf/t5462004.pdf. In 2004, 71,692 defendants pled guilty out of 83,391 federal defendants. *Id.*

## CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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# RESPONDENT'S BRIEF

98

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IN THE

# Supreme Court of the United States

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ANUP ENGQUIST,

Petitioner,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

Respondents.

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## BRIEF ON THE MERITS FOR RESPONDENTS

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On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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## QUESTIONS PRESENTED

Whether class-of-one equal protection analysis applies to decisions made by public employers with respect to their employees? If so, how should the theory apply and should it be limited so as to avoid subjecting every state and local government employment decision to federal court review?

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## BRIEF ON THE MERITS FOR RESPONDENTS

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### STATEMENT OF THE CASE

### A. Statement of Facts

#### 1. The promotion

In 1992, petitioner was hired to work as a Program Technician 1, International Food Standards Specialist, for the Export Service Center (ESC), one of two laboratories making up the Oregon Department of Agriculture's (ODA's) Laboratory Services Division. (E.R. 129-31; E.R.181-83; E.R. 114).[1] Initially, her job was funded under a grant to develop a database of food additives, laws, and regulations for several different countries. (E.R. 129-31). While she traveled under that grant, she also began to market ESC's services, which include testing and certifying exported foods and providing consulting services for companies that wish to export food overseas. (E.R. 131-33). Eventually, petitioner began to market ESC's services at trade shows and to provide consulting services to clients who wanted to formulate a product that complied with a specific country's regulations. (E.R. 133-37).

In 1999, the ESC manager, Gary Carter, left the ODA. (E.R. 136). The manager position remained vacant for almost two years, with an ESC chemist serv-

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[1] The citations are to the record before the Ninth Circuit Court of Appeals.

ing as the interim acting manager and petitioner absorbing some of Carter's former duties. (E.R. 152-53; E.R. 185-88).

During the summer of 2001, however, respondent John Szczepanski—the ODA Assistant Director in charge of overseeing the Laboratory Services Division—became concerned about the continued viability of the ESC in the marketplace. To address those concerns, then-ODA Director Phil Ward appointed Szczepanski to directly oversee ESC's operations. (E.R. 229; E.R. 245-46; E.R. 290-91; E.R. 103). Shortly after he was appointed to oversee ESC's operations, Szczepanski learned that ESC was on the cusp of losing its wheat-testing business—75 percent of its revenue—to a private laboratory that offered "lower prices and better service." (E.R. 296-98). Because ESC's budget operated almost entirely on fees charged for its services to exporters—rather than funding provided by tax revenues—the loss of wheat-testing revenue was devastating to ESC. (E.R. 289, 297). After learning this news, Szczepanski made it a priority to fill the still-vacant ESC manager position with someone who could guide the laboratory through the difficult financial period. (E.R. 298).

Petitioner and respondent Joseph (Jeff) Hyatt—who had worked at the ODA since 1990—both applied for the ESC manager position. (E.R. 141; E.R. 227). Although petitioner had a more extensive educational background and more experience with the consulting and customer-service aspects of the position, Hyatt was offered the promotion. (E.R.143; E.R. 155-57; E.R. 226). At trial, Szczepanski proffered several jus-

tifications for his choice. Specifically, Szczepanski indicated that he chose Hyatt over petitioner because he felt that Hyatt's experiences starting his own coffee company, developing business plans, managing budgets, running retail establishments, and working as a supervising chemist within the agency gave Hyatt the entrepreneurial, managerial, and marketing skills ESC needed. (E.R. 243; E.R. 300-02). Szczepanski also explained that, because Hyatt previously had worked as a chemist for the division, he understood what it takes to run a laboratory and, if need be, could "work the bench" as a chemist alongside his subordinates. (E.R. 302).

Petitioner did not get the promotion. Rather, as explained below, her position was eliminated and she was laid off several months later.

**2. The lay off**

In late 2001, ESC, which operated almost entirely on fee-based revenues, was running in the red because it had lost its wheat-testing business. (E.R. 216; E.R. 304-05). At that same time, the State of Oregon began falling into a recession. That recession, exacerbated by the events of September 11, 2001, led to a significant revenue shortfall for the State's 2001-2003 budget. (E.R. 104). In October 2001, the governor asked state agencies funded by tax and lottery revenues to immediately begin discussing budget-reduction proposals based on the governor's office's recommendations and guidelines. (E.R. 104). The governor instructed that budget cuts should be swift and long lasting and urged agencies to develop proposals that included "eliminating or restructuring

programs." (E.R. 104; *see also* E.R. 205, 213; E.R. 223).[2]

In response to that directive, in November 2001 respondent Szczepanski submitted a plan to address the Laboratory Services Division's budget problems. (E.R. 230-31). In that plan, he suggested that the department could reorganize the Laboratory Services Division by consolidating its two physically separate laboratories—the regulatory laboratory and the ESC—into one laboratory, allowing the laboratories to share operating costs, including employees, equipment, and rent. (E.R. 204; E.R. 220; E.R. 228; E.R. 231-37; E.R.108, 109). The regulatory laboratory, unlike the ESC, is funded from the State's general fund (comprised of tax funds and other revenue), and was subject to the budget-cutting directive. Thus, the purpose of the laboratory reorganization was two-fold: (1) it would reduce the regulatory laboratory's general-fund expenditures; and (2) it would address ESC's financial problems resulting from the loss of wheat-testing business. (E.R. 206, 216; E.R. 228; E.R. 231-33, 236-7; E.R. 108, 109).

As a result of ESC's loss of wheat-testing revenue and as part of the reorganization, petitioner's Program Technician 1, Food Standards Specialist, position—the only position at the ODA with that classifi-

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[2] The State is not allowed to "run in the red." Or. Const. Art. IX, § 6.

cation and description[3]—was chosen for layoff. Four "Chemist" positions were also chosen for layoffs in 2002; five additional positions were terminated in 2003. (E.R. 241-43; E.R. 308; E.R. 114, 115). Ultimately, ten out of a total of about 13 employees were laid off from the ESC. (E.R. 242).[4]

**3. Petitioner's "bumping" request**

Petitioner's layoff notice explained that her termination "does not reflect adversely on [her] performance, but [was] the result of reorganization." (E.R. 114). It also explained that she had five days to select one of the three options available pursuant to her collective-bargaining agreement. (E.R. 114). She could elect to (1) displace the ODA employee with the lowest seniority in her current classification in a position for which she was qualified; (2) demote to the lowest senior position in any classification in the ODA for which she was qualified; or (3) be laid off. (E.R.126; E.R. 121; E.R. 196-201).

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[3] Petitioner's position was one of only two Program Technician 1 positions at the ODA and the only "Food Standards Specialist" position in the entire agency. (E.R. 114, 115).

[4] The reorganization ultimately reduced the size of both the regulatory lab and the ESC, making it possible for the programs to share employees. At the time of trial, ESC's revenues were exceeding its expenses, which allowed the agency to lower the rates it charges for regulatory lab services. (E.R. 310-11; E.R. 314-16).

Unfortunately, there was only one other position classified as "Program Technician 1" within the entire agency. (E.R. 115). When she received notice of her layoff, petitioner was provided with information about that position, as the Grants Administrative Officer for the Natural Resources Division. (E.R. 196-200; E.R. 110, 114, 120). Petitioner understood that, pursuant to the collective-bargaining agreement, she would be allowed to bump into that position only if she was capable of performing the specific requirements of the position within a 30-day orientation period. (E.R. 146-47; E.R. 165-67; E.R. 196; E.R. 114). Petitioner's second option—taking a demotion—would have provided quite a few more options, but petitioner would have had to take a pay cut if she chose that option. (E.R. 197-98, 200-01).

Petitioner chose the first option—that is, she elected to attempt to displace the only other ODA employee occupying a Program Technician 1 position. (E.R. 196-97; E.R.115; E.R. 126). Petitioner was not allowed to bump into that position, however, because the ODA human resource manager, Karin Nilsson, determined that she did not have the requisite experience to perform the job within 30 days. Specifically, Nilsson concluded that petitioner did not have sufficient "knowledge of the functions, laws, statutes, rules, policies or procedures of the Soil and Water Conservation Districts, or the Agricultural Water Quality Management Program," and that it was not possible for someone without previous knowledge and experience with those matters to become familiar enough with them to "perform the duties of this job

adequately with only a 30-day orientation period." (E.R. 110, 115).

**B. District court proceedings**

As noted, petitioner worked for the ESC from 1992 until she was laid off in February 2002. Shortly after her layoff, she brought this lawsuit alleging, among other things, that her supervisors at the ODA, respondents Hyatt and Szczepanski, subjected her to harassment, denied her a promotion, deprived her of bumping rights, retaliated against her, and terminated her employment in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. (E.R. 1, 4-6) (JA 511). Petitioner also brought a state-law claim for intentional interference with her employment relationship, and sought economic, noneconomic, and punitive damages, as well as attorney fees and costs. (E.R. 6-7) (JA 11-12).

Respondents filed an answer in which they asserted that petitioner failed to state a claim upon which relief could be granted and that they are entitled to qualified immunity. (E.R. 8, 13-15). Respondents subsequently filed a motion for summary judgment. (E.R. 19-26). The district court later issued an order granting respondents' motion for summary judgment in part and denying it in part. (E.R. 27) (JA 13-48). The court declined to grant summary judgment in respondents' favor on several of petitioner's claims. (E.R. 50-52) (JA 40-47).

Respondents subsequently filed a motion for partial summary judgment, seeking to narrow the scope of petitioner's broadly pleaded equal-protection claim.

(E.R. 58). In their supporting memorandum, respondents asserted that, to the extent petitioner's equal-protection claim rested on a class-of-one theory, it failed as a matter of law because: (1) that theory does not apply to public-employment decisions; (2) petitioner had failed to identify other similarly situated employees; and (3) respondents are entitled to qualified immunity on that aspect of petitioner's claim. (E.R. 61-78). The district court denied respondents' motion, concluding that "there are genuine issues of fact as to whether p[etitioner] was singled out as a result of animosity," and inviting respondents to develop a record on the qualified-immunity issue at trial. (E.R. 79, 80, 88) (JA 59).

Respondents renewed their challenges to the class-of-one theory in their trial memorandum. (E.R. 97, 99). Respondents also moved in limine to exclude evidence supporting petitioner's class-of-one theory. (E.R. 89, 92). The district court denied those motions, except that it agreed that petitioner could prove her class-of-one theory only if she could demonstrate that other similarly situated persons were treated differently. (E.R. 95) (JA 60).

The remaining claims proceeded to an 11-day jury trial, focusing in large part on petitioner's theory that Hyatt and Szczepanski had hatched and executed a plan to "get rid of" her because of her race, color, gender, or national origin, or for arbitrary, malicious, or vindictive reasons. (*See, e.g.*, E.R. 326 (petitioner's closing argument)). Petitioner relied primarily on evidence that, before Hyatt was promoted to the ESC manager position, he and Szczepanski each had told

people that they had been working on a plan to "get rid of" petitioner. (E.R. 177; E.R. 326).

After petitioner rested her case-in-chief, respondents orally moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, renewing the challenges to the class-of-one theory they had raised on summary judgment. (E.R. 247). Respondents also asserted that they are entitled to qualified immunity on that claim. (E.R. 248). Respondents renewed their motions again at the close of their case-in-chief. (E.R. 319; *see also* E.R. 333). Respondents also objected to the jury instructions on the class-of-one theory contending that it was inappropriate for the district court to submit that claim to the jury. (E.R. 331) (JA 71).

Ultimately, the jury rejected all of petitioner's claims against the ODA and many of the claims against Hyatt and Szczepanski, including her claims relating to discrimination on the basis of a suspect classification. (E.R. 334) (App. 1-7). On that claim, the jury expressly found that respondents did not discriminate against petitioner "because of race, color, gender or national origin by causing the loss of promotion, loss of bumping rights or causing termination of her employment[.]" (App. 1). The jury nonetheless concluded that respondents Hyatt and Szczepanski violated petitioner's equal-protection rights and intentionally interfered with her employment relationship for other improper reasons—*i.e.*, out of malice or

for arbitrary or vindictive reasons. (E.R. 336-38) (App. 3-7).[5]

Specifically, the jury found that Hyatt and Szczepanski (1) "intentionally treat[ed] the plaintiff differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons"; (2) "subject[ed] plaintiff to arbitrary and unreasonable government actions causing [her] to be unable to pursue her profession"; and (3) "intentionally interfere[d] with [her] employment relationship through improper means or for an improper purpose by causing the loss of promotion, the loss of bumping rights or causing the termination of employment." (E.R. 336-38) (App. 3-6). The jury awarded economic, noneconomic, and punitive damages for each claim totaling $425,000. (E.R. 336-38, 374-76) (App. 4-7).

Following the verdict, respondents Hyatt and Szczepanski filed a written motion for judgment as a matter of law on each of the claims on which the jury

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[5] The jury also ruled in petitioner's favor on her substantive due process claim, but the Ninth Circuit later reversed, concluding that petitioner had not presented sufficient evidence to sustain that claim. *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 999 (9th Cir. 2007) (App. 28).

found in petitioner's favor. (E.R. 340-71).[6] The district court denied that motion as well. (E.R. 372, 373). The district court entered judgment in favor of petitioner and against Hyatt and Szczepanski on the class-of-one, substantive-due-process, and intentional-interference claims, and dismissed all other claims against respondents. (E.R. 374) (App. 8-11). The district court also awarded petitioner $172,740 in attorney fees, $5,073.58 in out-of-pocket expenses, and $16,322.58 in costs on her claims against respondents Hyatt and Szczepanski. (E.R. 379, 385) (App. 10-11).

**C. The Ninth Circuit decision**

The Ninth Circuit panel majority held "that the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees." *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007) (App. 27). The majority noted that, in other contexts, that court had applied class-of-one analysis, but the court had not yet decided "whether class-of-one theory

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[6] Petitioner contends, without citation to anything in the record, that she "presented as the relevant comparators for purposes of her class-of-one claim" the "approximately 30 LSD co-workers[.]" (Pet. Br. 7). In fact, respondents protested throughout the district court proceedings that petitioner never had identified any "similarly situated" comparators. They continued this protest in their post-trial motion for judgment notwithstanding the verdict and on appeal. (E.R. 348-50; App. Br. 29-32; Reply Br. 5-8).

should be extended to public employment decisions." *Id.* at 993 (App. 21). Ultimately, the majority determined that the class-of-one theory should not apply in this context. The State was acting as an employer, a setting in which its powers are broader than when government acts as a regulator, and in which "the scope of judicial review is correspondingly restricted." *Id.* at 994 (App. 24). The court also observed that "[i]n other areas of constitutional law, the [United States Supreme] Court has limited the rights of public employees as compared to ordinary citizens." *Id.* (App. 24)(citations omitted). The court concluded that "[t]he class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens." *Id.* at 995 (App. 25).

The panel also thought that "[a] judicially-imposed constitutional proscription of arbitrary public employer actions would * * * upset long-standing personnel practices." *Id.* (App. 25). "[E]mployers have traditionally possessed broad discretionary authority in the employment context." *Id.*(App. 25). And "[t]he power of employers to discharge employees for reasons that may appear arbitrary, unless constrained by contract or statute, is well-established under the common law of at-will employment." *Id.* (App. 25) (citations omitted). Applying equal protection class-of-one theory "to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of at-will employment." *Id.* (App. 25) (citation omitted). The panel declined to "effect such a significant change in employment law[.]" *Id.* (App. 25-26). The panel also was concerned that "applying the

class-of-one theory to public employment would * * * generate a flood of new cases." *Id.* (App. 26). Although the panel recognized and discussed this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), the panel concluded that brief opinion was "too slender a reed on which to base such a transformation of public employment law." *Id.* at 996 (App. 26). For those reasons, the panel majority held that the class-of-one theory does not apply to a public employer's decisions regarding its employees. *Id.* (App. 27).

On this point, the dissent disagreed. The dissent noted that the "[t]he majority's holding relating to the class-of-one theory of equal protection creates inter-circuit conflict[.]" *Id.* at 1011 (App. 60). The dissent also suggested that "[t]he majority's approach is * * * at odds with" this Court's precedent, citing *Village of Willowbrook v. Olech*. *Id.* (App. 61-62). The dissenting judge would have affirmed the award of damages on the class-of-one claim. *Id.* at 1014-15 (App. 67).

## SUMMARY OF ARGUMENT

The issues in this case are whether the class-of-one equal protection theory applies in the public employment context and, if the theory applies at all, how it should be cabined to avoid turning every public employment decision, from hiring and firing to promotion to who gets to take vacation when, into a constitutional case in federal court. Nothing warrants extending class-of-one theory into the context of public employment decisions.

Petitioner attempts to build her case for extending class-of-one theory into the public employment context on the text of the Equal Protection Clause, on the history underlying adoption of the Fourteenth Amendment, and on this Court's pre-*Olech* case law. None of those sources justifies the extension for which petitioner advocates. The text applies to "any person," but the constitutional text has not been taken literally and its framers did not intend that it be taken literally. Moreover, although the history that led to the adoption of the Fourteenth Amendment is in some respects unclear, what is clear is that the primary purpose of the amendment was to protect the rights of the newly freed slaves and to abolish class legislation. Class-of-one theory is far removed from those weighty concerns. In addition, although petitioner relies on prior case law, before *Olech* this Court had never expressly considered whether the Equal Protection Clause applies to a class of one.

Petitioner also suggests that class-of-one theory — flowing in her view inexorably from constitutional text, history, and prior case law — has been easily and consistently applied by the federal appellate courts. In fact, however, the federal appellate courts have struggled with application of the theory. Although the courts almost uniformly agree on the need to limit the theory so as to avoid constitutionalizing every state and local government decision, they are split on how to accomplish that result. Given the prospect of subjecting every government employment decision to scrutiny in federal court, the question becomes whether class-of-one analysis should be extended into the public employment context.

This Court should not extend class-of-one equal protection analysis into the public employment context because personnel decisions often are highly subjective, and subjecting them to constitutional scrutiny in federal court could led to random second-guessing of the decisions of public employers. Such a result could chill the exercise of public-employer discretion, to the detriment of both the employer and the public. A fearful or overly cautious public employer is not in the best interest of the government or the public it serves. In other constitutional contexts, this Court has held that ordinary public employment decisions are not subject to federal judicial review even if the decisions are mistaken, unreasonable, or pretextual. The rationale is that federal court simply is not the forum in which to review the multitude of personnel decisions made daily by public agencies. That rationale applies with equal force here.

This Court also has distinguished between government acting as an employer and government acting as a lawmaker or regulator, stressing that government has far broader discretion when it acts as an employer. That greater discretion, and the need for efficient provision of public services, also permit government to restrict the constitutional rights of its employees in a number of ways that would be impermissible if applied to citizens generally. Petitioner's approach, which is to apply customary rational-basis review to class-of-one cases brought by public employees, takes no account of government's role as an employer. Because of the number of variables and the individualized focus of employment decisions, customary rational basis review applies awkwardly at

best to those decisions. Because there are so many variables, it becomes impossible truly to determine who is similarly situated to the affected employee, and the means/ends analysis of equal protection law also threatens to become subjective in the extreme. Public employer decisionmaking should not be subject to the unpredictable and subjective second-guessing that would be the result of applying customary rational basis review to such decisions.

Thus, this Court should not extend the class-of-one theory into the public employment context. Doing so does not give adequate deference to the discretion of public employers, and in fact may chill the exercise of their discretion.

Alternatively, if this Court holds that the theory applies to public employer decisionmaking, the Court should restrict application of the theory. The Court can do that by imposing a demanding "similarly situated" requirement and by requiring that there be no conceivable rational basis for the government action and that animus or ill-will be the only possible explanation for the action. For many of the reasons given above, those restrictions are needed to avoid subjecting the employment-related decisions of public employers to subjective, unpredictable second-guessing in federal court. A rigorous "similarly situated" requirement will help to limit the number of variables in play and thus to reduce the degree of subjectivity and the risk of unpredictability that inheres in federal court review in the public employment context. Requiring that there be no conceivable rational basis for the government action and that animus or ill-will

be the only possible basis for the action is consistent with this Court's equal protection jurisprudence and also will help to reign in class-of-one cases if they permissibly can be brought to challenge the actions of public employers.

## ARGUMENT

### A. The text and history of, and this Court's case law regarding, the Equal Protection Clause do not lead to the conclusion that class-of-one analysis should apply to a public employer's personnel decisions regarding its employees.

According to petitioner, class-of-one equal protection theory flows "inexorably from the Constitution's text, its original meaning," and this Court's case law. (Pet. Br 20). In fact, however, class-of-one theory in general is at the outskirts of the concerns that underlie the Equal Protection Clause of the Fourteenth Amendment, and applying the theory in the context of decisions public employers make about their employees is so far removed from those concerns as to distort the clause and its application. Such an extension of the class-of-one theory is unwarranted.

Petitioner begins her argument by stressing the text of the Equal Protection Clause: "No state * * * shall deny to *any person* within its jurisdiction the equal protection of the laws." (Pet. Br. 14, quoting U.S. Const. amend. XIV, § 1) (emphasis added by petitioner). Petitioner's textual approach is flawed. To begin with, it is highly selective. She chooses to focus on the term "any person" while ignoring "of the laws."

To be sure, this Court has held that the Equal Protection Clause also protects against discrimination arising from the acts of administrative officials. *Ex parte Virginia*, 100 U.S. 339, 347 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907). But those decisions indicate that strict literalism has not guided this Court's interpretation and application of the clause.[7]

In addition, in a related context, the Court has not construed the term "any person" as being a signal that class-based discrimination is not required. This Court has interpreted the first clause of 42 U.S.C. § 1985(3), the surviving version of section 2 of the Civil Rights Act of 1871 – which applies to private conspiracies undertaken for the purpose of depriving "any person or class of persons" of the equal protection of the laws – as requiring a plaintiff to show *inter alia* "that 'some racial, or *perhaps otherwise class-based*, invidious discriminatory animus [lay] behind the conspirators' action[.]'" *Bray v. Alexandria Clinic*, 506 U.S. 263, 267-68 (1993), quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis added). Even though that statute includes the term "any person," the Court has required a showing of some racial or perhaps otherwise class-based discrimination.

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[7] In *Olech*, this Court did not rely on the wording of the Equal Protection Clause.

In any event, it is clear that at least some of those who considered and adopted the Fourteenth Amendment did not intend for the term "any person" to be taken literally. During the debates the following exchange occurred about application of the clause to women. The exchange makes it clear that, although the term "any person" was used, the Equal Protection Clause was not originally intended to extend to women. "Any person" did not literally mean *any* person.

> Mr. Johnson: Females as well as males?
>
> Mr. Howard: Mr. [James] Madison does not say anything about females.
>
> Mr. Johnson: "Persons."
>
> Mr. Howard: I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children are not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women's voting or of an infant's voting. He lays down a broad democratic principle, that those who are to be bound by the laws ought to have a voice in making them; and everywhere mature manhood is the representative type of the human race.

Bret Boyce, "Originalism and the Fourteenth Amendment," 33 Wake Forest L. Rev. 909, 986

(1998), quoting Cong. Globe, 39th Cong., 1st Sess. 2767 (1866). Respondents do not suggest a return to the mores (and prejudices) of the past, but the fact remains that by "any person" the framers did not really mean *any* person.

Turning from text to history, this Court has observed that evidence regarding the circumstances surrounding the adoption of the Fourteenth Amendment is "inconclusive." *Brown v. Board of Education,* 347 U.S. 483, 489 (1953). As one commentator has noted, the debates of the Thirty-Ninth Congress "certainly do not tell us whether the architects of the clause intended to extend 'equal protection' to a so-called 'class of one.' No one in the Thirty-Ninth Congress considered whether an individual could challenge government action motivated by alleged illegitimate animus under the Equal Protection Clause. The concerns of the time, which included the plight of the newly-freed slaves in the aftermath of a Civil War fought, in part, to render them free, were far weightier." Timothy Zick, "Angry White Males: The Equal Protection Clause and 'Classes of One,'" 89 Ky. L.J. 69, 88 (2000). That is, the focus of the debates and of the clause was to "abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). *See also id.* at 174 (in a true republican government there is "no class legislation, no class privileges" and no laws that legislate "against [one class] for the purpose of disadvantaging the interests of [another]"); Cong Globe, 39th Cong, 1st Sess. app. 219 (1866) (Equal Protection Clause was designed to prevent the

States from "deny[ing] to all citizens the protection of equal laws"); Cong. Globe, 40th Cong., 2d Sess. 883 (1868) (clause intended to give the federal government "the power to protect classes against class legislation"); Cong. Globe, 39th Cong., 1st Sess. 2511 (clause would "prohibit State legislation discriminating against classes of citizens"). *See also Plyler v. Doe*, 457 U.S. 202, 213 (1982) (Equal Protection Clause "was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation"); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.").

The weighty concerns that led to the adoption of the Fourteenth Amendment are far removed from class-of-one equal protection theory. As will be shown below, they are even farther removed when that theory is applied in the context of a public employer's decisions made about its employees.

In arguing that class-of-one analysis should apply in the public employment context, petitioner also relies on this Court's pre-*Olech* case law as a source for that theory. Of course, if it were true that this Court's holding in *Olech* in fact flowed "inexorably" from earlier case law, it would be strange indeed that there was a preexisting circuit split as to whether the Equal Protection Clause applies to a class of one. *Compare Futernick v. Sumpter Township*, 78 F.3d 1051, 1057-60 (6th Cir. 1996) (declining to accept the plaintiff's class-of-one equal protection theory); *New*

*Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481-82 (7th Cir. 1990) (equal protection claim lacked merit because the "plaintiffs [did] not allege that they [were] singled out because they belong to any particular class"); *with Esmail v. Macrane,* 53 F.3d 176, 180 (7th Cir. 1995) (recognizing class-of-one claim, although admitting that the theory was "remote from the primary concern of the framers of the equal protection clause"). And if earlier case law led as inevitably to class-of-one analysis as petitioner suggests, there would seem to have been little need for this Court to have granted certiorari in *Olech* "to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group." *Olech*, 528 U.S. at 564 (footnote omitted). The case law was simply not as settled or self-evident as petitioner contends.

Petitioner cites *Missouri v. Lewis*, 101 U.S. 22, 30, 31 (1880), *Barbier v. Connolly*, 113 U.S. 27, 31 (1885), and *Atchison, Topeka & Sante Fe R.R. v. Mathews*, 174 U.S. 96, 104-05 (1899), contending that, while none of them use the phrase "class of one," "all recognize the underlying principle that individuals, not just classes, are entitled to equal protection." (Pet. Br. 17). None of those cases dealt with a class of one, however. In *Lewis,* state law prescribed that all appeals were to be taken in the state Supreme Court except for appeals in cases from four counties and one city, which were to be taken to a court of appeals, with only some of those cases being then appealable to the Supreme Court. 101 U.S. at 29. *Barbier* considered a city and county licensing scheme for laundries.

113 U.S. at 29-30. And in the opinion, the Court observed that "[c]lass legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Id.* at 32. *Atchison, Topeka & Sante Fe R.R.* concerned a state law that assumed negligence when damages were due to a fire caused by operating a railroad, and that in some circumstances imposed attorney fees against the railroad. 174 U.S. at 97. Because none of those cases involved a class of one, they do not lead, inexorably or otherwise, to endorsement of the theory, especially in the context of public employment.

In arguing that class-of-one analysis "represents the logical application of this Court's settled precedents" (Pet. Br. 21), petitioner also relies on *Sunday Lake Iron Co. v. Wakefield Township,* 247 U.S. 350 (1918), *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), *Snowden v. Hughes*, 321 U.S. 1 (1944), *Allegheny Pittsburgh Coal v. County Commission*, 488 U.S. 336 (1989), and *Wade v. United States*, 504 U.S. 181 (1992). (Pet. Br. 18-19). Yet none of those cases is truly a class-of-one case. *Sunday Lake Iron Co.* dealt with application of a state law that required the reappraisal of all mining properties. *Sioux City Bridge Co.* focused on the remedy that should be applied when a taxpayer's property had been overvalued. The state court had held that the proper remedy was to raise the rate of taxation on other properties. 260 U.S. at 444, 446. In *Snowden,* the Court concluded that there was no adequate allegation of pur-

poseful discrimination. 321 U.S. at 10. *Allegheny Pittsburgh Coal* dealt with a tax assessment system that valued recently sold properties based on the purchase price and that undervalued properties that had not been sold in the recent past. 488 U.S. at 338, 344. In *Wade*, the Court simply held that "federal district courts have authority to review a [federal] prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive[,]" such as "race or religion." 504 U.S. at 185-86. Those cases do not logically extend to applying class-of-one analysis in the context of public employment decisions.

In sum, neither the text or history of the Fourteenth Amendment, nor this Court's pre-*Olech* case law, compels the conclusion that class-of-one equal protection analysis should be applied to judge the myriad of day-to-day decisions public employers make about their employees.

**B. The federal appellate courts have struggled to define the elements of a class-of-one equal protection case and have been cautious in applying the theory; that prudent caution counsels against extending the theory into the public employment context.**

Respondents do not gainsay that in *Olech* this Court applied class-of-one equal protection analysis in a situation where the Village allegedly had "intentionally demanded a 33-foot easement as a condition of connecting [the plaintiff's] property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated prop-

erty owners." 528 U.S. at 565 (citation omitted).[8] But, although petitioner portrays the circuits' response to *Olech* as one of simplicity and uniformity, in fact the response has been fractured, leading to Judge Posner's plea for this Court to "enlighten us" regarding the elements of a class-of-one claim. *Bell v. Duperrault*, 367 F.3d 703, 711 (7th Cir. 2004) (Posner, J., concurring). *See also Jennings v. City of Stillwater*, 383 F.3d 1199, 1210 (10th Cir. 2004) (in the wake of *Olech*, lower courts have struggled to define the contours of class-of-one cases).

The response also has been notably cautious, with judges worrying about the transformation of every local or state governmental decision into a constitutional matter and about thus trivializing application of the Equal Protection Clause. *See Olech*, 528 U.S. at 566 (Breyer. J., concurring in the result) (noting the concern that application of the theory could "transform many ordinary violations of city or state law into violations of the Constitution"); *Cordi-Allen v. Conlan*, 494 F.3d 245, 252 (1st Cir. 2007) (class-of-one claims must be limited because otherwise, "the federal court would be transmogrified into a supercharged version of a local zoning board"); *Jennings*, 383 F.3d at 1210-11 (unless carefully circumscribed,

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[8] Admittedly, in *Olech* the Court also cited *Sioux City Bridge*, *Sunday Lake Iron*, and *Allegheny Pittsburgh Coal Co.* in support of the Court's endorsement of class-of-one analysis. *Id.* But those decisions had not explicitly considered the issue.

concept of class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors). In this situation, the question then becomes whether to extend application of the theory into the public employment context.

### C. The other circuits that have applied class-of-one analysis in the public employment context have given the issue little thoughtful consideration; applying class-of-one analysis in this context has been questioned.

As petitioner notes, the nine other circuits that have considered the question have all held that class-of-one analysis applies in the public employment context. (Pet. Br. 22 & n. 9). *See Campagna v. Mass. Dep't. of Envt'l Prot.*, 334 F.3d 150, 156 (1st Cir. 2003); *Neilsen v. D'Angelis*, 409 F.3d 100, 104 (2nd Cir. 2005); *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3rd Cir. 2006); *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004), *cert. denied*, 547 U.S. 1187 (2006); *Whiting v. Univ. of Miss.*, 451 F.3d 339, 348-50 (5th Cir. 2006), *cert. denied* ___ U.S. ___, 127 S. Ct. 1038 (2007); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006); *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005); *Howard v. Columbia Pub. Sch. Dist.*, 363 F.3d 797, *cert. denied*, 543 U.S. 956 (8th Cir. 2004); *Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1148-49 (10th Cir. 2001). Nevertheless, although there is no doubt that the split exists, what is notable about the other circuits' decisions, applying the class-of-one theory in the context of public employment actions, is both

their lack of analysis – of any careful consideration of whether the theory should apply in this setting – and their sense of unease about the theory in general. That is, while the other circuits apply the class-of-one theory, they hardly embrace it.

None of the other circuits' decisions cited above contains any thoughtful analysis of whether the class-of-one theory should apply to review government employer decisionmaking. The usual approach is simply to cite *Olech* and then apply the theory. *See, e.g., Hill,* 455 F.3d at 239; *Campagna*, 334 F.3d at 156. That lack of analysis may flow from the fact that the plaintiff almost always is unsuccessful in these cases. *See Engquist*, 478 F.3d at 994 (making that point, and citing cases for it).

Applying class-of-one analysis to public employment decisions has been the subject of some criticism, however. In *Lauth v. McCollum*, 424 F.3d 631 (7th Cir. 2005), the plaintiff, a village police officer, brought suit in federal court after the police chief asked the village's board to sanction the officer for misfeasance (the board obliged). Judge Posner observed that "[t]here is clearly something wrong with a suit of this character coming into federal court dressed as a constitutional case." *Lauth*, 424 F.3d at 632. If class-of-one cases can be brought in federal court, and if "any unexplained or unjustified disparity in treatment by public officials is therefore to be deemed a prima facie denial of equal protection, endless vistas of federal liability are opened. Complete equality in enforcement is impossible to achieve; nor can personal mo-

tives be purged from all official action[.]" *Lauth*, 424 F.3d at 633, citing *inter alia Olech*.

### D. Applying class-of-one equal protection analysis in the public employment context is an extremely poor fit.

#### 1. By their nature, personnel decisions single out individual employees; public employers need considerable flexibility in managing their operations and their employees.

Applying class-of-one analysis in a public employment context is a particularly poor fit. At the outset of this discussion, it may be helpful to clarify what respondents mean by a "class of one" in this context. "Class of one" is not to be taken literally. *Olech* itself may have involved a class of five, rather than of one. 528 U.S. at 564 n. *. Instead, "'[c]lass of one' is somewhat of a misnomer, in that what distinguishes such claims is the absence of a constitutionally salient class identification, not the number of plaintiffs per se." *Grubbs v. Bailes,* 445 F.3d 1275, 1281-82 n. 4 (10th Cir.), *cert. denied* ___ U.S. ___, 127 S. Ct. 384 (2006) (citation to *Olech* omitted). That is, class-of-one cases are those in which the governmental action taken, and the alleged discrimination itself, define the supposed class, aside from any other shared characteristic(s) of the class members. Nonetheless, although class-of-one cases are not defined by a specific number, the larger the class the more likely it is that discrimination based on some shared class characteristic can be proven or at least inferred. Thus, class-of-one cases are apt to involve a few individual plaintiffs who claim that they arbitrarily have been treated dif-

ferently from others similarly situated for no rational reason. In the public employment context, such a claim will often reduce to a contention that the public employee was treated differently because the employer or someone in authority did not like the employee and had no rational reason for the dislike.

Yet personnel decisions, by their very nature, single out individual employees. Sometimes employees are singled out based on obviously rational differences—*i.e.*, differences in educational background or quality and quantity of work. But oftentimes, employment decisions are based on highly subjective value judgments—*e.g.*, perceived levels of assertiveness, maturity, or the ability to work well with or manage others. Indeed, employment decisions might even boil down to a characteristic as esoteric as whether the employee is a good "fit" for the work environment.[9]

As an employer, the government has a strong interest in having the flexibility to decide how best to manage its operations and employees. Judicial oversight of these day-to-day personnel decisions would undermine efficient decisionmaking and would ultimately trivialize the important protections guaran-

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[9] In this case, for example, the jury's verdict may represent nothing more than the judgment that respondents did not like petitioner and that their dislike was arbitrary. Whether someone's dislike of another person is arbitrary or rational is a highly subjective value judgment.

teed by the federal constitution. As one district court judge aptly put it, because "practically every employee, public or private, is bound to be convinced at some point that he or she is getting the short end of the stick, it is not hard to imagine the bee hive of constitutional litigation that would be generated by this variant of the 'class of one' doctrine." *Campagna v. Commonwealth of Mass.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff'd* 334 F.3d 150 (1st Cir. 2003).[10]

**2. Ordinary public-employment decisions are not subject to federal judicial review, even if they are mistaken, unreasonable, or pretextual.**

It is well settled that ordinary public-employment decisions—those that do not implicate a fundamental right or a suspect classification—are not subject to federal judicial review, even if they are mistaken, unreasonable, or pretextual. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 679 (1994) (plurality opinion) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information"); *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) ("state law, rather than the Federal Constitution, generally governs the substance of the [pub-

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[10] And if this bee hive may not yet be actively humming, as petitioner suggests, that may be due to the fact that the vast majority of public employees have recourse to remedies other than bringing an equal protection claim in federal court.

lic] employment relationship"); *Connick v. Myers,* 461 U.S. 138, 146-47 (1983) ("ordinary dismissals * * * are not subject to judicial review * * * even if the reasons for the dismissal are alleged to be mistaken or unreasonable"); *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (public-employment decisions do not implicate due-process concerns even if a supervisor "deliberately lied" about his reasons for terminating the employee). *See generally Singleton v. Cecil*, 176 F.3d 419, 425-28 (9th Cir.), *cert. den.*, 528 U.S. 966 (1999) (en banc) (canvassing Supreme Court jurisprudence relating to judicial review of public-employment decisions).

In *Bishop*, for example, a police officer who had been terminated without a hearing claimed that he had been deprived of a property interest in his employment and of the liberty interests to be free from public stigma and pretextual termination. In addressing the officer's second claimed liberty interest—freedom from termination based on false information—the Court concluded that the termination did not implicate a liberty interest even if the supervisor had *deliberately lied* about the reasons for terminating the officer although "[s]uch fact might conceivably provide the basis for a state-law claim[.]" *Bishop,* 426 U.S. at 349 and n.13 (emphasis added).

This Court did not end its discussion there. Rather, the Court went on to explain more generally that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349.

> We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.

*Id.* at 349-50. *See also Connick*, 461 U.S. at 146-49 (relying, in part, on the limitations set forth in the above-quoted passage from *Bishop* to explain why public-employment decisions involving speech on matters of private concern are not subject to judicial review). The rationale behind the Court's refusal to review most challenges to public-employer decision-making is simple: It reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143.[11]

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[11] Petitioner's response to this line of cases is to assert that, because they deal with the Due Process Clause, they "bear no relation to the guarantee [of] the Equal Protection Clause[.]" (Pet. Br. 40 n. 15). But in some respects that assertion begs the question

*Footnote continued...*

That rationale applies with equal force here. There is nothing about the Equal Protection Clause that defeats the "common-sense realization that government offices could not function if every employment decision became a constitutional matter," *id*, or that indicates that federal court is the appropriate forum in which to review the multitude of personnel decisions made daily by public agencies.

**3. Government's role as an employer is significantly different from its role as an enforcer of the law and provider of public services.**

The limited scope of review that generally applies to public employment decisions also stems from the recognition that the government agency's role as a sovereign enforcer of the law and provider of public services is fundamentally different from its role as an employer. *Waters*, 511 U.S. at 679-80; *see also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) (noting difference between government action to manage its own internal affairs and action "to regulate or license"). Indeed,

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*(...continued)*
that is presented here – petitioner asserts that "the Equal Protection Clause applies to all persons, whether or not they are part of a special class[.]" And it is beside the point in any event, which is that this Court had recognized that federal court review of everyday public employment decisionmaking is neither required nor wise.

as the Court explained in *Waters*, "the government as employer * * * has *far broader powers* than does the government as sovereign." *Waters*, 511 U.S. at 671 (emphasis added). For example, "when a[] [public] employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counterspeech." *Id.* at 672. And the Court never has suggested "that the Constitution bars the governor from firing a high-ranking deputy" for criticizing the governor's legislative program. *Id.*

As the Court cautioned in *Waters*, reviewing courts should not treat the government's interests as an employer the same way it treats the government's interests as a sovereign. *Id.* at 674-75. Rather, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as an employer." *Id.* at 675. Consequently, even when a public-employment decision implicates protected speech, for example, reviewing courts must take care to assign the government's efficiency concerns as an employer "a greater value" and to give the employer's justification for its actions "greater deference." *Id.* at 673, 675. *See also Kelley v. Johnson,* 425 U.S. 238, 245 (1976) (finding fact that policeman, subject to hair-grooming standards, brought claim as public employee, rather than as citizen, "highly significant"); *Rutan v. Repub. Party of Ill.,* 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (noting that restrictions Constitution places upon government in its capacity as lawmaker, that is, as regulator of private conduct, are

not same as restrictions it places upon government in its capacity as employer, and cataloging examples).

**4. Government may impose restrictions on the constitutional rights of its employees that it may not impose on private citizens.**

Because government's role as an employer is significantly different from its role as an enforcer and administrator of laws, government may restrict the constitutional rights of its employees in many ways that would not be permissible if applied to others. "Private citizens perhaps cannot be prevented from wearing long hair, but policemen can." *Rutan,* 497 U.S. at 94 (Scalia, J., dissenting), citing *Kelley v. Johnson,* 425 U.S. at 247. In many circumstances, public employees' workplaces and property may be searched without probable cause and without a warrant. *O'Connor v. Ortega,* 480 U.S. 709, 723 (1987) (plurality); *id.* at 732 (Scalia, J., concurring in the judgment). Public employees can be dismissed if they refuse to provide incriminating information that relates to their job performance. *Gardner v. Broderick,* 392 U.S. 273, 277-78 (1968). Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for engaging in such speech. *Connick,* 461 U.S. at 147. Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed or punished for that reason. *Public Workers v. Mitchell,* 330 U.S. 75, 101 (1947); *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 556 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601, 616-17 (1973).

A close reading of these lines of authority thus reveals the following about constitutional claims raised by public employees: If a public employee's challenge to an adverse employment decision does not implicate a fundamental right or a suspect classification, it is not subject to federal judicial review. Allowing federal review in such ordinary cases would conflict with the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143.

Petitioner responds to this argument by asserting that "[t]he government as employer still acts as sovereign" (Pet. Br. 24), but it never has been respondents' position that the State somehow loses its status as sovereign when it acts as an employer. Instead, respondents' point is that the fact that this case arises in the public employment context is, as this Court put it in *Kelley v. Johnson*, "highly significant." 425 U.S. at 245. Petitioner apparently shares the view that this context makes a difference. At points in her brief, she indicates that the class-of-one equal protection right should somehow be tailored to fit this context. (*e.g.*, Pet. Br. 11, 34). But, other than stressing the difficulties in proving a rational basis equal protection claim, she offers no clue as to how the public employment context should be taken into account. She simply argues for application of the usual approach. She also contends that what respondents argue for and what the Ninth Circuit majority approved is unprecedented because exempting public employment decisions from class-of-one analysis will somehow nullify a constitutional right. But the public

employee who cannot claim relief under the First Amendment because she is not speaking on a matter of public concern, for example, or the policeman who must face grooming requirements that would be impermissible if applied to others, is equally without constitutional recourse. Line-drawing is involved in all of these examples. The only difference here is that respondents urge that the line be drawn at the point where the "class" is defined solely by the action taken or by the supposed discrimination itself. When the class is defined solely in that way, no equal protection claim should lie in the public employment context.[12]

**5. Applying class-of-one equal protection analysis to public employment decisions would subject public employer decision-making to random second-guessing.**

Drawing the line at that point is appropriate—not only because of the distinction between government as regulator and government as employer, and because of the considerably broader discretion that government enjoys as an employer and the corresponding limits that it may impose on what would otherwise be its employees' constitutional freedoms—but because customary equal protection analysis at best applies

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[12] And holding that public employees cannot pursue a class-of-one claim against their employer would not withhold from public employees any constitutional right enjoyed by private employees, who cannot bring an equal protection claim against their employers.

awkwardly in a class-of-one setting and, in the employment context in particular, reduces to the kind of random second-guessing criticized in *Jennings*, 383 F.3d at 1210. *See also Waters*, 511 U.S. at 676 (plurality) (allowing judicial factfinder to determine facts to which the *Connick* test is applied would force the government manager to "have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw").

As discussed above, employment decisions are inherently subjective, involve a multitude of variables, and inevitably depend upon judgments that focus upon the particular qualities and personalities of individuals. Normal rational basis equal protection analysis requires a showing that others similarly situated were treated differently. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). When a class or group is involved, and a difference in treatment is shown, "[t]he sample size is large enough to raise a concern that the disfavored class was selected not because they were the most culpable [or the most eligible], but because of their membership in the class." *Jennings*, 383 F.3d at 1213. But when the sample is reduced to a single individual or a few individuals, "there is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible rele-

vant factors." *Id.* at 1213-14.[13] Thus, as the focus narrows, the difference in treatment of those similarly situated becomes less and less an indication of impermissible discrimination and more and more simply an indication of a difference in treatment that says nothing about discrimination. A public employer will almost inevitably treat employee A somewhat differently than employee B, and employee A will always be different in some relevant respects and similar in some respects to employee B. Because of the number of variables, the "similarly situated" requirement fails to perform its usual function. Instead, the inquiry threatens to collapse on itself and to permit a jury to find discrimination simply because its members do not believe that a proffered reason for an employment action is rational enough to have convinced them to take that action.

In the public employment context, the threat of such a "subjective canvassing" in a judicial proceeding may hinder and chill the exercise of the employer's discretion, leading to government inefficiencies and poorer public service. The prospect of such second-guessing by a jury also is inconsistent with the concept of at-will employment. Because an at-will employee can be fired for any reason or no reason at all, *Waters*, 511 U.S. at 679 (plurality), 688 (Scalia, J., concurring), it makes little sense to review the deci-

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[13] In *Jennings,* the court suggested that the key to understanding *Olech* is that it is a single-variable case. *Id.* at 1214.

sion to determine if it was made for an irrational reason. By definition, it is not rational to fire someone or take some other employment action for no reason.[14]

Rational basis review under the Equal Protection Clause also generally examines whether a reasonable "fit" exists between the legislative or administrative goal and the means chosen to effect that goal. *See, e.g., Cleburne,* 473 US at 446 (requiring such a fit). When a class or group is involved, "fit" analysis allows one to consider "whether the class's distinctive trait (*e.g.*, its status as black, mentally retarded or Chinese) is a satisfactory proxy for the conduct the government seeks to regulate" or whether instead the fit is so poor as to indicate that government is acting irrationally. William D. Araiza, "Litigating Takings: Irrationality and Animus in Class-of-One Equal Protection Cases," 34 Ecology L.Q. 493, 505 (2007). In contrast, the particularized nature of class-of-one cases, and of class-of-one public employment cases in particular, makes it extremely difficult to perform conventional "fit" analysis. Again, the number of variables and the narrow focus on a single individual

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[14] That is not to say that applying class-of-one analysis in the public employment context would spell the end of at-will employment. Respondents admit that where such claims have been recognized apparently the sky has not fallen and at-will employment has not come to an end. But it is to say that the concept of at-will employment is at odds with class-of-one rational basis review.

or a few individuals, and on other individual comparators, makes it almost impossible to determine whether the action chosen is rationally related to a legitimate end. That determination becomes a highly subjective one.

In short, applying customary rational-basis review to a class of one in the public employment context can only lead to unpredictable, indeed irrational, results. Because so many variables are in play, and because employment decisions often are both highly subjective and particularized, neither the "similarly situated" nor the means/end "fit" analysis can perform their usual function, at least with any predictability. When an employee is singled out for discipline, and when that employee necessarily is alike in some respects and different in others to other employees, how is one to determine whether those employees are all similarly situated? When only that employee is disciplined, how is one to decide whether the discipline chosen is rationally related to the employee's situation, without taking over the role of the employer and substituting one's own judgment for that of the employer? The decisions of public employers should not be subject to such subjective, unpredictable second-guessing in federal court.

In sum, class-of-one analysis should not apply in the public employment context, where the government's discretion as an employer is broad, where public employees' rights must be adjusted to accommodate that discretion, where employees may be at-will ones, and where the number of variables and the often subjective nature of employment decisions about

hiring, promoting, laying off, and firing employees make customary rational basis review difficult, if not impossible, to apply. Attempting to apply customary rational basis review in this setting could chill the exercise of public employer discretion, leading to government inefficiency and poor public service. Applying such review also threatens to subject the decisions of public employers and managers to subjective, random second-guessing in federal court. This Court should affirm the decision of the Court of Appeals and hold that class-of-one equal protection analysis does not apply in the public employment context.

**E. If class-of-one analysis applies at all in the public employment context, it should be limited by requiring that those who are claimed to be similarly situated be very similar indeed, and by requiring that there be no conceivable rational basis for the action taken and that animus be the only possible reason for the employment action.**

Alternatively, this Court should cabin application of the class-of-one theory in this context. All the reasons given above for not applying class-of-one analysis in the public employment context also are reasons for restricting the theory if it applies at all. How class-of-one analysis should apply to the decisions of public employers, if it should apply at all, is fairly included in the question presented by petitioner. Petitioner asks "[w]hether *traditional equal protection 'rational basis'* analysis" applies. (Pet. Br. i) (emphasis added). And, as mentioned above, what is striking about the federal appellate courts' response to *Olech*

is the expressed concern that class-of-one analysis, unless restrained, can serve to federalize every governmental decision and thus trivialize the protection of the Equal Protection Clause, and the courts' attempts to restrict application of the theory. *See Indiana Teachers v. School Com'rs of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) (concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts); *Jennings*, 383 F.3d at 1210 (in wake of *Olech,* lower courts have struggled to define the contours of class-of-one cases; noting the danger that federal courts will become general purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking). The effort to restrict application of class-of-one analysis generally has taken two forms: (1) a more-demanding "similarly situated" test, and/or (2) a requirement of a showing that there is no conceivable rational basis for a governmental decision and that animus is the only possible reason for the decision. If this Court decides that class-of-one equal protection analysis applies in the public employment context, respondents urge the Court to impose both of those requirements.

The Second Circuit requires that the "similarity between plaintiffs and the persons with whom they compare themselves must be extremely high." *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005) (citation omitted). The Seventh Circuit demands that a class-of-one plaintiff prove that the plaintiff was treated differently than someone else who is *prima facie* identical in all respects. *Purze v. Village of Winthrop Harbor,* 286 F.3d 452, 455 (7th Cir. 2002) (citation omit-

ted). The Eighth Circuit has stressed that "[i]dentifying disparity in treatment is especially important in class-of-one cases." *Barstad v. Murray County*, 420 F.3d 880, 884 (8th Cir. 2005), citing *Jennings*, 383 F.3d at 1213. To effect that requirement, the court demands that the plaintiff find a comparator who was treated differently *in the same time period*. *Barstad*, 420 F.3d at 884 (citation omitted). As discussed above, the reason for this enhanced "similarly situated" requirement is that as the sample size reduces to a few or to one and the number of variables increases, "there is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible relevant factors." *Jennings*, 383 F.3d at 1213-14.[15] And that is particularly true in the public

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[15] In addition, a more stringent standard must be applied than is applied in a racial discrimination case. "Otherwise, the [defendant] in the former will perversely find it easier to perform an illegal act than in the latter. A finding of general 'similarity' alone would do the trick in the 'class of one' case, even where the differential treatment was the result of a good faith disagreement as to the governmental interests or simple negligence, while a finding of racial motive based on the entire record would be needed in the employment discrimination case. The standard of similarity in such a 'class of one' equal protection case cannot be one under which persons who believe they may have suffered racial discrimination would find it

*Footnote continued...*

employment context because employment decisions are by their nature highly subjective. Given that reality, a strict and demanding "similarly situated" requirement is needed to make certain that the fact-finder in federal court is truly reviewing the actual decision that the employer made – should I fire, promote, or lay-off this employee or that one? The question of whether petitioner satisfied the "similarly situated" requirement remains open in this case. Defendants raised it on appeal (App. Br. 29-32), but the Ninth Circuit did not reach it.

Had the Ninth Circuit reached the issue, it would have found that petitioner failed to prove that respondents treated other similarly situated employees differently. As noted, a state action will trigger equal-protection review only if the person invoking equal protection was treated differently from other "similarly situated" persons. *Cleburne*, 473 U.S. at 439; *see also Olech*, 528 U.S. at 564 ("class of one" claim requires proof that the plaintiff "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"). Persons are "similarly situated" if they are in "all relevant respects" alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Thus, to prevail on her class-of-one claim, petitioner had to prove that other

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*(...continued)*
to their legal benefit to abandon the race claim – the core of equal protection – in order to argue that they are a 'class of one.'" *Neilson*, 409 F.3d at 106.

ODA employees who were like her "in all relevant respects" were treated differently.

She failed to satisfy that burden with respect to any of the adverse employment actions at issue here. Because only one person—Hyatt—was promoted to ESC manager, petitioner could successfully challenge the promotion on a class-of-one theory only if she proved that she and Hyatt were alike in all relevant respects. In other words, she was obligated to show that the two of them had substantially similar backgrounds. Petitioner failed to make that showing. To the contrary, as she conceded below, Hyatt was more qualified than her in at least two respects—he was more familiar with the laboratory's standard operating procedures and had experience working as a chemist for the Laboratory Services Division. (E.R. 155).[16] Because petitioner and Hyatt were not similarly situated in all relevant respects, her equal-protection challenge to the promotion decision fails as a matter of law.

Petitioner also failed to prove that respondents treated other similarly situated employees differently during the layoff and bumping processes. The record reflects that several, indeed most, other ESC employ-

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[16] Petitioner nonetheless believed that Szczepanski could not rationally have chosen Hyatt over her because she has a more extensive educational background and more experience with the consulting and customer service aspects of the position. (E.R. 143; E.R. 155).

ees were laid off and, as a result, were treated the same way petitioner was treated. To the extent petitioner is claiming that she was treated differently from the ESC employees who were not laid off or who were allowed to bump into other laboratory positions, her claim nonetheless fails because she did not demonstrate that those employees held similar jobs. *Cf. Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (employees are similarly situated "when they have similar jobs and display similar conduct"). The record reflects that no other ODA employee held a job similar to petitioner's because petitioner's position was the *only* Program Technician 1, Food Standards Specialist, position in the entire agency. (E.R. 114, 115).[17] Moreover, unlike other positions in the ESC, most of the work petitioner performed could not be directly billed out to a client. (E.R. 241; E.R. 306).

Even assuming, for the sake of argument, that equal-protection guarantees come into play when a public employer treats unequally employees who are identical in all relevant respects, petitioner still failed to prove her claim. When, as in the present case, government actors treat unequally persons who are unequal in a rationally relevant respect, the Equal Protection Clause does not apply. *Garrett,* 531 U.S. at

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[17] It was undisputed below that the only other "Program Technician 1" position in the agency was the "Grants Administrative Officer" position plaintiff attempted to bump. (E.R. 110, 115).

366-67 ("where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation") (citation and internal quotation marks omitted). Petitioner failed to demonstrate that respondents treated her differently from employees who were like her in all relevant respects. In fact, the record, viewed in the light most favorable to petitioner, shows that no other employee was similarly situated. As a result, petitioner's class-of-one claim should fail as a matter of law.

In addition to strictly applying the "similarly situated" requirement, the other way in which federal courts have sought to limit class-of-one cases after *Olech* is to require some showing of animus, ill-will, or "reasons of a personal nature unrelated to the duties of the defendant's position." *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001). *See also Williams v. Pryor*, 240 F.3d 944, 951 (11th Cir. 2001); *Shipp v. McMahon*, 234 F.3d 907, 916-17 (5th Cir. 2000), *overruled on other grds*, *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002); *Bryan v. City of Madison*, 213 F.3d 267, 276-66 and n. 17 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). Only one federal appellate court decision has held that proof of a personal motive is not required. *Jackson v. Burke*, 256 F.3d 93, 96-97 (2nd Cir. 2001) (*per curiam*). And the court that decided that case later described the assertion as "dicta" and said the question whether a personal motive is required is an open one. *Harlen Associates v. Incorporated Village of Mineola*, 273

F.3d 494, 499-500 (2nd Cir. 2001).[18] The reason for imposing the requirement again is to limit the reach of class-of-one cases. *Bell*, 367 F.3d at 709 (Posner, J., concurring) (otherwise anyone can claim to be a class-of-one plaintiff).[19]

Imposing an animus requirement is not barred by this Court's decision in *Olech*. In *Olech* the majority noted that the plaintiff's complaint alleged that the Village's demand for a wider easement than that demanded of other similarly situated property owners "was 'irrational and wholly arbitrary[.]'" 528 U.S. at 565. Those allegations, the Court concluded, were "sufficient to state a claim for relief * * *" *Id.* The Court thus found it unnecessary to "reach the alternative theory of 'subjective ill will' relied on by" the court below. *Id.*[20] The Court left the question open.

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[18] The split on this issue is described in more detail in *Bell*, 367 F.3d at 711.

[19] In citing these decisions, respondents do not necessarily agree with the circuits' view of the role of animus in the analysis. At least some of these decisions appear to view the test as a subjective one, in which a showing of animus serves as a substitute for a showing of no rational basis. *See, e.g., Hilton,* 209 F.3d at 1008. Consistent with this Court's case law, respondents argue for an objective test.

[20] Justice Breyer, concurring in the result, noted that the appellate court had found that the respondent "had alleged an extra factor as well – a factor that the Court of Appeals called 'vindictive action,'

*Footnote continued...*

And, as Judge Posner has noted, "[it] is not as if the term 'irrational and wholly arbitrary" were self-defining." *Bell,* 367 F.3d at 711 (Posner, J., concurring). *See also DeMuria v. Hawkes*, 328 F.3d 704, 706-07 (2nd Cir. 2003) (pointing out that *Olech* dealt with a dismissal on the pleadings, and not with what a plaintiff must prove).

The rule in rational basis review is that the State need not articulate its reasoning when it makes a particular decision. "Rather, the burden is upon the challenging party to negative '"any reasonably conceivable state of facts that could provide a rational basis for the classification."'" *Board of Trustees v. Garrett,* 531 U.S. 356, 367 (2001), quoting *Heller v. Doe,* 509 U.S. 312, 320 (1993), in turn quoting *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993). But, in *Garrett*, this Court explained the role that animus, ill-will, "negative attitudes," or "fear" nevertheless can play in rational-basis equal protection analysis. Because the test is an objective one, that looks to whether there is any reasonably conceivable state of facts that could provide a rational basis for the action taken, "[a]lthough such biases [as

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*(...continued)*
'illegitimate animus,' or 'ill will.'" *Id.* at 566, quoting *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998). In Justice Breyer's view, "the presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.*

negative attitudes or fear] may often accompany irrational (and therefore unconstitutional discrimination, *their presence alone does not a constitutional violation make*." *Id.* (emphasis added). Instead, as this Court noted in *Cleburne*: "'Mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning [or other] proceeding, are not permissible bases for treating a home for the mentally retarded [or a person] differently * * *'" *Id.*, quoting *Cleburne*, 473 U.S. at 448 (emphasis added in *Garrett*; bracketed material added).

Thus, although animus, ill-will, or impermissible reasons for a governmental action can weigh in the analysis, "their presence alone does not a constitutional violation make." For a constitutional violation to have occurred, "[t]hose reasons 'must be the *only* reasons for the adverse action of which the plaintiff is complaining. If there are legitimate as well as illegitimate reasons, the presence of the latter will not taint the former." *Bell*, 367 F.3d at 713 (Posner, J., concurring) (emphasis in original; citation omitted). *See also Lauth*, 424 F.3d at 634 (animus comes into play only when, no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff, the action would be inexplicable unless animus had motivated it). As Judge Posner points out, "[i]t would be absurd to give a convicted murderer a remedy under the equal protection clause merely because the prosecutor, in addition to thinking it his duty to prosecute, hoped that the publicity from a successful prosecution would enable him to launch a political career." *Bell*, 367 F.3d at 713.

In sum, even if this Court decides that the class-of-one equal protection theory applies in the public employment context, the Court should limit the reach of the theory. The Court can accomplish that result by imposing a strict and demanding "similarly situated" standard *and* by clarifying that such a constitutional claim requires that there be no conceivable rational basis for the action taken and that ill-will or animus must be the only possible basis for what the employer did. Although resolution of those issues may not be absolutely required here, the issues are fairly included in the question presented by petitioner. The circuits are in disarray on how to limit class-of-one claims, although they are virtually unanimous on the need to do so to avoid constitutionalizing every state and local government decision. Both a rigorous "similarly situated" requirement, and the endorsement of an objective test that looks to ill-will and animus only if that can be the only conceivable basis for an employment action, serve to limit the reach of class-of-one claims, in the public employment context in particular and more generally. Moreover, both requirements are true to this Court's equal protection jurisprudence. Clarification on these points will assist the lower courts, and help to bring predictability and consistency to this area of the law, to the benefit of both plaintiffs and government defendants.

## CONCLUSION

To reiterate, class-of-one claims are not defined by a number *per se*, but by the fact that it is the action taken against the member(s) of the class that itself defines the class. Although such classes are not de-

fined by a number, by their very nature they are apt to be small and individualistic, rather than being marked by any class characteristic. Applying the Equal Protection Clause to such classes is far removed from the weighty concerns that led to adoption of the Fourteenth Amendment. Extending class-of-one equal protection analysis into the public employment arena is not compelled by the text or history of the Fourteenth Amendment or by this Court's case law. Applying the theory in the public employment context also overlooks the inherently subjective nature of many (if not most) employment decisions, the greater discretion that government exercises when it acts as an employer, rather than as a lawmaker or regulator, and this Court's past reluctance to countenance federal court review of the multitude of day-to-day employment decisions made by state and local governments. Petitioner herself suggests that the public employment setting is significant and that it should be taken into context, but she offers no analytical response other than that customary rational basis review should apply. That response is not adequate. To avoid constitutionalizing every employment action made by state and local government employers and managers, this Court should hold that class-of-one equal protection analysis should not extend to the public employment context.

Alternatively, even if the theory applies to review public employment decisions, the theory should be limited by imposing a demanding "similarly situated" requirement and by applying an objective test, that looks to see whether there is any conceivable rational basis for the employment action taken or whether in-

stead animus or ill-will is the only possible reason behind the action. Such limitations will help to constrain class-of-one theory in this context, and are true to this Court's equal protection case law.

For all the reasons given above, this Court should affirm the judgment of the court of appeals.

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# REPLY BRIEF

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# In the Supreme Court of the United States

ANUP ENGQUIST,

*Petitioner,*

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY BRIEF FOR PETITIONER

Based solely on policy concerns, the Ninth Circuit held that the Equal Protection Clause does not protect public employees who are singled out for adverse treatment by public employers without a rational basis and only for vindictive or malicious reasons. This Court granted the petition to resolve this single issue.

Respondents effectively concede that the Ninth Circuit's policy concerns are unfounded:

- "Respondents admit that where [class-of-one] claims have been recognized apparently the sky has not fallen and at-will employment has not come to an end." Resp. Br. 40 n.14.
- "[T]he plaintiff almost always is unsuccessful in these cases." *Id.* at 27.
- "There may be millions of government employees, but the number of successful class-of-one equal protection claims brought by public employees against their employers is almost nil." Resp. Br. Opp'n 23.
- The absence of a flood of litigation in the nine circuits that have recognized class-of-one claims in public employment "may be due to the fact that the vast majority of public employees have recourse to remedies other than bringing an equal protection claim in federal court." Resp. Br. 30 n.10.

Respondents also acknowledge that the Fourteenth Amendment's text supports the right of any person, including public employees, to bring class-of-one claims. *Id.* at 14. Respondents argue, however, that "the constitutional text [should not be] taken

literally." *Id.* Further, in defending the Ninth Circuit's decision, Respondents distort the record and raise legal and factual issues foreclosed by the jury's verdict.

There is only one Equal Protection Clause. The Court has consistently interpreted it to apply in the public employment context as in all others. Reversal is warranted on this ground alone. Moreover, Respondents admit that the lower courts have been able to weed out meritless public employee class-of-one claims using *existing* rules. This Court therefore need not decide whether animus or some other additional requirement is needed to cabin public employees' class-of-one claims. Indeed, because the jury found animus here, the adoption of such a requirement would still require reversal of the decision below.

## I. THE EQUAL PROTECTION CLAUSE PROTECTS INDIVIDUALS FROM DISCRIMINATORY TREATMENT BY STATE EMPLOYERS.

Respondents do not contend that *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam), should be overruled. Instead, they argue that this Court should adopt a new *per se* rule, excluding some public employees from the definition of "persons" under the Fourteenth Amendment. This proposed rule radically departs from the Amendment's text and history and this Court's precedents.

### A. The Constitutional Text Plainly Protects All Persons, Including Public Employees.

"This Court has constantly reiterated that the language of the Constitution where clear and

unambiguous must be given its plain evident meaning," *Reid* v. *Covert*, 354 U.S. 1, 8 n.7 (1957) (plurality), and that "no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible," *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339 (1816).

The text of the Equal Protection Clause unambiguously protects "any person." Its "basic principle" is to "protect *persons*, not *groups*." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). A public employee is no less a "person" than the property owners in *Olech*, and, like them, the public employee may assert a class-of-one claim.[1]

Respondents counter that the Framers' reference to "'[a]ny person' did not literally mean *any* person." Br. 19. But the statements they quote concern the Apportionment Clause, not the Equal Protection Clause. Cong. Globe, 39th Cong., 1st Sess. 2766-67 (1866).

### B. This Court Has Already Held That the Fourteenth Amendment Protects Individual Public Employees from Discriminatory Treatment By State Employers.

This Court has repeatedly held that under the Equal Protection Clause, a public employer's discriminatory treatment of its employees is subject to rational basis review, even when no fundamental right or suspect class is involved. *E.g.*, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979); *Harrah*

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[1] Although Respondents complain that Petitioner ignores the phrase "of the laws," Br. 17, this Court has made clear that the phrase includes not only legislative but also administrative actions. Pet. Br. 17-20.

*Indep. Sch. Dist.* v. *Martin*, 440 U.S. 194 (1979) (per curiam); *Mass. Bd. of Ret.* v. *Murgia*, 427 U.S. 307 (1976). Respondents simply ignore this precedent, while the United States unconvincingly seeks to distinguish it.

*Amicus* United States claims that this precedent is distinguishable because it involves circumstances in which "the government categorically excludes a class of workers," and thus the court reviewed an employment classification "to determine whether the objective, group-based distinction [was] rationally related to a legitimate government interest." U.S. Br. 9. This distinction fails for a number of reasons.

First, the proposed distinction between a group and a class-of-one is artificial. As Respondents observe, "'Class of one' is not to be taken literally. *Olech* itself may have involved a class of five, rather than of one." Br. 28. Engquist could, of course, have characterized her claim as part of a group, a "class of two" with Corristan. Pet. Br. 6. The number of affected individuals has no bearing on whether they possess an equal protection right. As *Olech* establishes, the Fourteenth Amendment protects classes of one, two, or five. And government actions can be even more dangerous when aimed at a single individual. *Amici* Br. of Richard Epstein & Rutherford Inst. ("Epstein Br.") 8.

Second, the United States' proposed theory glosses over key facts. In *Harrah*, for instance, this Court did not review an official regulatory or legislative policy, but rather a school board's vote to handle an individual teacher's case in a particular manner. Martin's challenge was not to the official Board policy to deny raises to teachers who did not comply, but instead to the Board's vote to treat her noncompliance as grounds for not renewing her

contract. This Court properly subjected "the Board's action" against Martin to rational-basis review. 440 U.S. at 199.

Third, as *Harrah* reveals, the United States' proposed distinction makes little sense in practice. It is rarely possible to know whether a state employer's discrimination is an official government policy or a government official's decision, as a matter of his policy preferences, to target a particular class. A line between an official policy targeted at some non-suspect class (*e.g.*, the class of employees with green hair, or employees who blow the whistle on a supervisor, or employees who are over 65 years old) and an official's decision to target some individual characteristic or behavior (*e.g.*, dying one's hair green, or blowing the whistle on a supervisor, or being 66 years old) is unworkable.

Fourth, this Court long ago rejected the theory that governments could evade the Fourteenth Amendment if its discrimination was the result of an official's policy decision in some particular case rather than of a formally adopted law or regulation. *E.g.*, *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944) (holding that "unequal application" of an otherwise neutral law constitutes a denial of equal protection if it intentionally targets "a particular class or person" or if the state official has a "discriminatory design to favor one individual or class over another"); *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907). This Court's precedents are well-founded, for a classification that derives from a formally adopted official policy is no more pernicious than a classification targeted by a single official, at a single individual.

In sum, Respondents and their *amici* propose abandoning this Court's settled and well-understood

precedent—that discrimination in employment is subject at least to rational-basis review—for an alternative that has no basis in the Constitution, conflicts with this Court's precedents, and would be tremendously difficult to implement (if not entirely meaningless) in practice.

### C. This Court Takes Public Employer Interests Into Account When Enforcing Public Employees' Constitutional Rights, Instead of Eliminating Those Rights.

The United States erroneously asserts that this Court has "categorically foreclosed constitutional claims that have the potential to disrupt the workplace and impair the functioning of public employers." Br. 8. On the contrary, this Court carefully balances constitutional commands with public employers' interests on a case-by-case basis.

To be sure, this balancing may yield "more limited" forms of constitutional protection "in the public employment context," U.S. Br. 9, but this Court has never imposed a *categorical* forfeiture of those rights. See, *e.g.*, *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) ("[W]e reject the contention made by the Solicitor General . . . that public employees can never have a reasonable expectation of privacy in their place of work.").[2]

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[2] The United States' description (Br. 9) of *O'Connor* is incomplete. There, this Court unmistakably held that public employees possess Fourth Amendment rights and a reasonable expectation of privacy. 480 U.S. at 717. Indeed, both the plurality and the concurring Justice emphasized that constitutional "protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as

None of the opinions cited by Respondents or the United States (U.S. Br. 8-9, 15; Resp. Br. 34-37) "categorically foreclos[ed]" public employees from bringing constitutional claims. In *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), the denial of First Amendment protection was focused entirely on the fact that the speech in question was performed in furtherance of official duties—*i.e.*, job-related speech. *Id.* at 422-25. This Court specifically declined to decide whether the same would hold true for *non*-job-related speech.[3] Here, in contrast, the jury found *no* conceivable job- or performance-related rationale for Respondents' action. *Garcetti*'s holding was a result—not a repudiation—of this Court's traditional balancing. *Id.*

Similarly, in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court stated that "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, *as long as that reason is related to his view concerning the outcome of the case to be tried.*" *Id.* at 89 (emphasis added and internal quotation marks omitted). And in *J.E.B.* v.

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employer." *Id.* at 717 (quoting *id.* at 731 (Scalia, J., concurring in the judgment)). Similarly, although a government employer has substantial discretion in employee management, the Constitution forbids such an employer from acting in a "patently arbitrary" manner. *Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 898 (1961); Pet Br. 31.

[3] This rule does not apply to all speech. As the United States acknowledges, where an employee's statements are not made in her professional capacity, "the Court has balanced the employee's interests against the government's interest in effectively performing its functions." U.S. Br. 9 (citing *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968)). *Garcetti* itself eschewed a *per se* rule, expressly reserving the question of "whether the analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425.

*Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court stated: "Our conclusion that litigants may not strike potential jurors solely on the basis of gender . . . does [not] conflict with a State's legitimate interest in using such challenges *in its effort to secure a fair and impartial jury*." *Id.* at 143 (emphasis added).

Far from holding that equal protection never applies, the jury cases recognize that peremptory challenges must be rationally related to the governmental interest at hand. For example, *Batson* and *J.E.B.* allow a prosecutor to remove a disabled juror because she may become drowsy at trial. See *United States* v. *Harris*, 197 F.3d 870, 876 (7th Cir. 1999). But they do not permit removal based on a prosecutor's "irrational animosity toward or fear of disabled people." *Id.* "[W]here a classification is subject only to 'rational basis' review, the state may use its peremptory challenges to strike jurors for any reason rationally related to the selection of an impartial jury." *Id.* at 874.

Just as a peremptory challenge must rationally relate to the "outcome of the case," a public employer's decisions must rationally relate to some legitimate government purpose. Indeed, what applies to jury selection applies *a fortiori* to employment, given inherent constraints upon *voir dire*. See *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring); William Blackstone, 4 Commentaries *346 (describing peremptory challenges as an "arbitrary and capricious species of challenge").

Respondents' reliance (Br. 37) on *Kelley* v. *Johnson*, 425 U.S. 238 (1976) is similarly unavailing. In that case, this Court rejected a police officer's due process challenge to a grooming regulation only after finding the regulation rationally related to legitimate government interests. *Id.* at 247-48.

Respondents and their *amici* make no response to *Wade* v. *United States*, 504 U.S. 181 (1992), in which this Court unanimously allowed an equal protection challenge to a prosecutor's failure to seek a downward departure. Indeed, equal-protection rights of convicted felons are not limited to sentencing. See *Sandin* v. *Conner*, 515 U.S. 472, 487 n.11 (1995) ("Prisoners . . . retain other protection from arbitrary state action even within the expected conditions of confinement" and "may invoke . . . the Equal Protection Clause"). Thus, on Respondents' logic, convicted felons have greater protections than public employees, notwithstanding the greater judicial burden of sentencing challenges

Only one appellate court—the Ninth Circuit—has departed from this well-settled balancing approach and categorically denied the protections of the Equal Protection Clause to a single class of people. Nine other courts of appeals followed this Court's consistent approach, carefully balancing government and employee interests on a case-by-case basis. Pet. Br. 22; Epstein Br. 13-16. No flood of litigation has resulted. Pet. Br. 49-56. Enough time has passed to put such concerns to rest. Cf. *Metro. Stevedore Co.* v. *Rambo*, 515 U.S. 291, 300 (1995) (dismissing litigation-flood concerns based on 11-year experience).

Respondents seek support from *Lauth* v. *McCollum*, 424 F.3d 631 (7th Cir. 2005), but that decision did not nullify public employees' class-of-one claims. It permitted them. Noting that it was "reluctant to complicate the law by proposing different standards for different categories of discriminatory state action," it took the "more promising approach" of ensuring that the standard of proof was appropriately

protective of both government employers and employees. *Id.* at 634.

*Amicus* United States contends that categorical exclusion of public employee class-of-one claims is essential because simply recognizing that such claims may be asserted severely impairs government efficiency. Br. 16-17.[4] This is hyperbole. To state a claim, an employee must allege that the employer singled her out for a reason not rationally related to a legitimate employment-based interest, and ultimately prove that the employer's proffered rationales for its actions are implausible and not rationally related to any employment-based concern. The limited reach of such a claim reveals why the government's interest in efficiency should not absolutely trump the equal protection right; the whole point of allowing the claim is to guard against irrational and discriminatory employment actions by public employers. Valid as efficiency concerns may be, it cannot be in the public interest to act in such ways.

The United States further argues that the rarity of successful class-of-one actions is reason to eliminate them. But that rarity is a reason to allow such actions, not prohibit them. This Court continues to recognize *Bivens* actions, for example, even though the success rate of such claims is vanishingly small. See HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 821 (5th ed. 2003) (reporting

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[4] For federal employees, *Bivens* actions are foreclosed. Pet. Br. 52 n.18; U.S. Br. 22 n.5. Nor is equitable relief available, for reasons advanced by the United States elsewhere. U.S. Opp. Cert. 8-9, *Dotson* v. *Griesa*, 126 S. Ct. 2859 (2006) (No. 04-1276). The United States also admits that sovereign immunity may bar claims and that exhaustion would be required. U.S. Br. 22 n.5. Tellingly, they fail to quantify the number of employees (undoubtedly tiny) lacking administrative appeal rights.

that in 15 years, "more than 12,000 *Bivens* actions had been filed; that only thirty had resulted in judgments for plaintiffs at the trial level . . . that only four judgments had actually been paid; and that settlements are rare."). Similarly, *Wade* downward-departure challenges are almost never successful, yet this Court recognizes them.

### D. Respondents' Policy Arguments Do Not Distinguish this Case from *Olech*.

Respondents and their *amici* warn that allowing class-of-one claims by public employees will subject every decision by public employers to judicial scrutiny. The local government made the same argument in *Olech*. Pet. Br. at 7, *Olech*, 528 U.S. 562 (No. 98-1288).

As Respondents concede, this feared result has not come to pass. Although judges have expressed concern "about the transformation of every local or state governmental decision into a constitutional matter," Resp. Br. 25, their concerns have not been limited to employment. In fact, none of the opinions Respondents cite regarding this "transformation" is an employment case. *Id.* (citing Justice Breyer's concurrence in *Olech*; a zoning case, *Cordi-Allen* v. *Conlon*, 494 F.3d 245, 252 (1st Cir. 2007); and a law-enforcement treatment case, *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1210 (10th Cir. 2004)).

Respondents do not ask this Court to overrule *Olech*, which is, in any event, deeply rooted in the Constitution's text and precedent.[5] But the very

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[5] *Olech* refutes Respondents' assertion (Br. 23-24) that its holding did not flow from earlier decisions. The Court acknowledged—without dissent—that "[o]ur cases have recognized successful equal protection claims brought by a 'class

cases they cite undermine their policy-based claim that employment decisions, alone among all state actions, should be immune from the Equal Protection Clause.

Carving out employment is particularly inapt because there is often no material difference between the state's control over an individual's livelihood as employer, on the one hand, and as regulator, on the other. State actions affect employment in a host of ways—through direct employment, contracting, licensing, and regulation. Under Respondents' theory, the following individuals have recourse while the public employee does not: an architect who is repeatedly singled out and denied licenses by a Building Commission without rational basis; an architect whose projects are singled out for particularly strict regulation without rational basis; and an architect with whom the government contracts and then terminates without rational basis. See *Burt* v. *New York*, 156 F.2d 791 (2d Cir. 1946) (L. Hand, J.) (considering, in light of *Snowden*, the claims of an architect whose applications were denied because of "personal hostility").

It makes little sense, and denies "equal protection," to allow such individuals, but not public employees, to challenge irrational governmental treatment. To be sure, the balancing test for an equal protection claim may weigh more heavily in the government's favor in the employment context, where the employee has day-to-day interaction with the government actor, but that is no reason for the courts to extend

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of one.'" 528 U.S. at 564 (citing *Allegheny Pittsburgh Coal* v. *County Comm'n*, 488 U.S. 336 (1989); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918)). *See also* Pet. Br. 18-19 (citing additional authority). [0]

equal protection to one type of interaction and deny it to another. Whether an individual is directly employed by the State, or merely dependent on it for his employment, provides no basis for unequal treatment under the Constitution.

Finally, the opinions cited by Respondent demonstrate that courts have successfully avoided constitutionalizing everyday government action "with regard to everything from zoning to licensing to speeding to tax evaluation." *Jennings*, 383 F.3d at 1211. Governments make millions of zoning and licensing decisions, many of which are fraught with personality disputes of epic proportion. As discussed in detail in Part II, *infra*, the courts of appeals have carefully accounted for government interests by following this Court's equal protection doctrine, as prescribed in *Olech*.[6]

In sum, Respondents and their *amici* raise the same alarmist policy concerns that were submitted to this Court in *Olech*. This Court rejected those concerns then, they have not materialized in practice in the interim, and they provide no basis for distinguishing this case from *Olech* now. For these reasons alone, this Court should reverse the opinion of the Ninth Circuit.

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[6] *Olech* therefore adheres to this Court's repeated admonition that any difficulty in line-drawing is no justification for extinguishing a right altogether. *E.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 519-20 (1997) (noting that, although it is difficult to distinguish "the line" between statutes permissibly and impermissibly enacted under § 5 of the Fourteenth Amendment, "the distinction exists and must be observed").

## II. TRADITIONAL EQUAL PROTECTION DOCTRINE APPROPRIATELY BALANCES THE CONSTITUTIONAL RIGHTS OF EMPLOYEES AND THE INTERESTS OF THEIR EMPLOYERS.

Nine courts of appeals recognize class-of-one claims brought by public employees. No litigation flood has resulted. At-will employment continues to exist in States in all nine of those circuits. This Court's traditional equal protection doctrine has proved sufficient to prevent or quickly dispose of meritless claims, avoiding the constitutionalization of "everyday" government employment decisions.

The class-of-one claim serves an important but limited function. It prevents the government from discriminating against its employees without any rational basis. The claim furthers good government by precluding public authorities from intentionally and irrationally depriving individuals of their livelihoods, and by guaranteeing taxpayers that renegade managers will not abuse valuable public employees.[7] Class-of-one plaintiffs will—and should—succeed only in those rare cases in which the government employer acts in ways that are not conceivably related to the public interest, and that can serve no plausible government purpose.

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[7] The federal experience shows that prohibiting arbitrary employment decisions improves government functioning and job performance. *Amici* Br. of Nat'l Educ. Ass'n *et al.* 16-18.

### A. The Highly Deferential Rational-Basis Test Protects Government Employment Decisions from Invasive Judicial Scrutiny.

Even if a public employer intentionally treats an employee differently from others similarly situated, the employee cannot prevail on a class-of-one claim unless she establishes that the government lacks any basis for its action that is rationally related to a legitimate government interest. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446-50 (1985). This traditional rational-basis test is highly deferential and avoids improper judicial intrusion into government decisionmaking.[8]

Under the rational-basis test, a plaintiff may show that the "'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (citation omitted). Thus, the state action must be

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[8] There are reasons why the rational-basis test could apply differently to administrative than to legislative action. As the United States observes, the "any conceivable basis" concept has roots in the notion that the remedy for bad legislation is with the "people" via the ballot box. U.S. Br. 25 (quoting *McCray* v. *United States*, 195 U.S. 27, 55 (1904)). That logic is irrelevant in assessing administrative employment decisions. It is also difficult, if not impossible, to divine the actual motivations of hundreds of legislators, unlike individual employment actions. In addition, this Court has rejected explicitly the "any conceivable basis" test in the analogous context of Administrative Procedures Act challenges. *E.g.*, *Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 626-27 (1986) (plurality). Because Respondents failed to appeal the jury's verdict that Petitioner's termination lacked any rational basis, this case is not an appropriate vehicle to decide whether a different standard should apply.

"grounded in a sufficient factual context for [the Court] to ascertain some relation between the [challenged] classification and the purpose it served." *Romer* v. *Evans*, 517 U.S. 620, 632-33 (1996).

As Petitioner detailed in her opening brief, the rational-basis test is particularly difficult for employee-plaintiffs to satisfy because of the wide range of legitimate government purposes in the employment context. Pet. Br. 47-49. Given the individualized nature of the employment relationship, the government has more latitude in its employment-related decisions than in regulating at arms-length. Whereas concerns about an individual's personality or working style would not be relevant in land-use, they are unquestionably relevant in employment. After all, what is "rational" in the workplace is very different from what is "rational" in the Statehouse.

Class-of-one plaintiffs can virtually never overcome performance or work-environment rationales.[9] In fact, it is a rare case indeed when a plaintiff can survive an employer's motion for summary judgment indicating a performance or work-environment rationale for unequal treatment. While the United States contends otherwise (Br. 13), in the vast majority of situations, there is no need for trial because a supervisor's discontent with the employee's performance or the effect thereof on workplace efficiency will be sufficient for the government to satisfy the rational-basis test.

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[9] In only rare cases could a plaintiff negate these stated reasons for the adverse action, even if untrue. An example might be a situation in which a supervisor claims an employee disrupts his work environment, but the employee works 1000 miles away and never interacts with anyone.

In sum, the rational-basis test does not lead to excessive judicial review of legitimate government employment decisions. If the government plausibly claims performance issues as the basis for its discrimination, the inquiry ends there.

### B. Engquist Prevailed Here Only Because Respondents Disclaimed Any Performance Rationale for Their Discriminatory Treatment.

Respondents do not quarrel with the jury finding that there was "no rational basis" for their differential treatment of Engquist.[10] The United States' invitation to this Court to second-guess the jury's finding, U.S. Br. 32, is too late.

Respondents explicitly *disclaimed* any workplace or performance-based rationale for terminating Enquist.[11] Nonetheless, for Engquist to prevail, she still had to convince the jury that there was "no rational basis" for Respondents' action, and to do so in the teeth of a business-judgment instruction that barred the jury from finding for her based on its disagreement with Respondents' stated reasons. App. A-5 ("You should not find that a decision is unlawful just because you may disagree with the defendant's stated reasons or because you believe the decisions are harsh and unreasonable . . . ."); 10B Trial Tr. 110, 150-51.

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[10] The Ninth Circuit did not question the jury's rational-basis verdict either, Pet. App. 19.

[11] Respondents successfully barred many of Engquist's trial witnesses on this ground. E.g., App. A-2 (quoting Respondents' attorney discussing eleven witnesses "all of which are primarily put on the witness list . . . to talk to how well plaintiff did her job, and it is not going to be the defendants' position the plaintiff did not do her job well.").

At trial, Respondents had every opportunity to offer any conceivable theory for differentiating Engquist from other employees, even rationales that did not actually motivate them. *E.g.*, 8 Trial Tr. 3-4 (State claiming they noticed only after termination that Engquist purportedly misrepresented her qualifications). But those defenses failed because the jury found as a matter of fact that the proffered rationales could not be rationally related to the decision to fire Engquist instead of others similarly situated. *E.g.*, *id.* at 5-9 (showing how State misread her job application).

The position of the United States and other *amici* demonstrates how the rational-basis test works in practice to account for "everyday" employment decisions. *Amici* assert that the state budget crisis provided ample rationale for Engquist's termination. U.S. Br. 7; *Amici* Br. of Pa. *et al.* ("Pa. Br.") 14. The budget crisis was one of Respondents' initial stories, but they abandoned it because Engquist was paid from customer fees, not the state budget. 3 Trial Tr. 47-48. Oregon's budget cuts were no more relevant to Engquist than cuts in California.[12]

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[12] 4B Trial Tr. 36 (Deputy Director of the Department of Agriculture stating that no cost-shifting arrangement was in place so cutting her position could not save General Funds and would not be rational). The budget-crisis rationale was tried (unsuccessfully) in a parallel case by her co-worker, Corristan, who was paid from the Oregon budget.

The trial revealed that the stated rationales for Corristan's and Engquist's terminations contradicted one another. With Corristan, Respondents asserted a need for General Fund reductions, and with Engquist, they asserted a need due to ESC shortfalls. 6B Trial Tr. 30. This high-wire act collapsed in both cases when it was pointed out that they hired a new employee out of ESC funds (instead of using those funds for Corristan) and were contemplating yet another hire. Nor could

In the end, the jury trial showed that Respondents' decision to terminate Engquist instead of others similarly situated could not possibly be explained by any business judgment or conceivable rational basis. J.A. 64.[13]

Respondents could have argued at any point that Engquist had to be dismissed because of performance or workplace concerns. But they did not make such arguments and instead disclaimed them. And for good reason. Had they claimed that they were firing Petitioner for a performance-related reason, they would have been required to use the collective bargaining agreement's generous procedures for termination for cause.

In sum, rational-basis review applies to government employment actions. This test usually places a nearly insurmountable burden on plaintiffs. The government may permissibly discriminate against an employee if it can point to a plausible rational basis for its action. It is only when, as here, the plaintiff has negated those rationales that a claim may proceed.

### C. Several Additional Factors Limit Successful Class-of-One Claims and Prevent Burdensome Litigation.

As explained, the rational-basis test is highly deferential to state action. Moreover, a series of additional requirements under traditional doctrine—(1) similarly-situated employees; (2) intentional

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Respondents explain why they terminated Engquist, who was the major source of ESC revenue. *See infra* pages 21-22.

[13] On a separate count, intentional interference with contract, the jury found that Respondents acted "against the employer's best interest," or for their own benefit outside the scope of their employment. 10B Trial Tr. 135-36.

discrimination; (3) adverse employment actions; (4) and high pleading standards—further limits successful cases, particularly in employment.

*First*, the Parties agree that the similarly-situated requirement is difficult for employees to satisfy. Although Respondents do not detail their proposed test, they identify two subtests in use today: (a) that the comparator be "*prima facie* identical in all respects," and (b) the comparator be "treated differently *in the same time period*." Resp. Br. 43-44 (citations omitted). Petitioner agrees entirely with the second standard, and with much of the first. Contrary to the United States' position (Br. 17), there is no confusion in the law about this requirement.

With respect to the "prima facie identical" concept, the test turns on similarity in respects *relevant* to the state's treatment of the employee-plaintiff, as the cases make clear. Pet. Br. 37-38. It is of no consequence that two employees have different hair colors unless that trait is relevant to the employment decision. The requirement is for *similar*, not *identical*, individuals. See *Miller-El* v. *Dretke*, 545 U.S. 231, 247 n.6 (2005). The similarly situated requirement ensures that discriminatory treatment—and not mere policy disagreement—is at issue.

Here, the trial court and jury found that Petitioner fulfilled this requirement. The Ninth Circuit never reached the question. For that reason, Respondents do not even ask this Court to resolve it. Instead they merely speculate that "[h]ad the Ninth Circuit reached the issue, it would have found" for them. Resp. Br. 45. That prophecy is not correct, particularly since the similarly situated requirement requires detailed examination and is a question of fact. *E.g.*, *George* v. *Leavitt*, 407 F.3d 405, 414-15 (D.C. Cir. 2005). Since the Ninth Circuit has not

considered the issue, and neither party asks this Court to resolve it, the Court should not do so. And the fact that this issue is still lingering is yet another reason why this Court should decline Respondents' invitation to adopt prematurely a series of further "heightened standards" at this juncture.

In any event, to correct the record, there was ample evidence for the jury's finding. Respondents proffered one rationale for their termination of Engquist—declining wheat revenues. Engquist proved that she was similarly situated to the other employees with respect to that rationale.[14] She identified 30 comparators. 6B Trial Tr. 58. The degree of similarity was complete with respect to the proffered justification—the employees were all potentially subject to a layoff due to declining wheat revenues.[15] The trial court agreed. *Id.* at 68.[16]

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[14] Budgetary rationales traditionally involve inquiry into whether similarly-situated persons are singled out impermissibly. *E.g.*, *Romer*, 517 U.S. at 635 (finding goal of "conserving resources to fight discrimination against other groups" inadequate to preclude antidiscrimination protections for homosexuals); *James* v. *Strange*, 407 U.S. 128 (1972) (holding as unconstitutional a debt recoupment statute that treated civil and criminal defendants differently because the government could not explain why criminal defendants were singled out for less favorable treatment) *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982) ("[E]ven if improvement in the quality of education [due to increased funds] were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion.").

[15] Respondents' closing argument was devoted to the wheat story. 10B Trial Tr. 65, 70-74, 99-100. It failed for many reasons, including the fact that the shortfall was actually caused by Respondents' actions (2 Trial Tr. 64; 8 Trial Tr. 181-82, 185; 1 Trial Tr. 121), that new products would replace any potential loss in wheat (3 Trial Tr., 105; 8 Trial Tr. 215-217), that budget

cuts were unnecessary (3 Trial Tr. 25-26, 35; 8 Trial Tr. 218), and that Szczepanski disavowed the restructuring rationale a few months after terminating Engquist (7 Trial Tr. 147).

If anything, the differences among comparators cut in Engquist's favor. Respondents retained employees who brought in no income or clients, while terminating Engquist, who brought in the bulk of revenue and new clients—approximately $200,000 from 40 different clients in 2001 alone. 2 Trial Tr. 30. Szczepanski admitted that Engquist "was the main person to get business." 5 Trial Tr. 180; see also 3 Trial Tr. 47-48 (testimony that it was irrational to fire Engquist because she was in a "business gathering position" "essential to the center."); *id.* at 68, 112-13; 10B Trial Tr. 29. Szczepanski also hired another person, Hyatt, and reprogrammed the position to pay for it out of wheat revenues. 3 Trial Tr. 22-23 (stating that filling position cost ESC $40,000); 1 Trial Tr. 94-95; 6B Trial Tr. 30. And just days *after* terminating Engquist, Respondents sought to hire another new employee in wheat. 4B Trial Tr. 38-39. Hyatt admitted at trial that he "made false statements about Anup Engquist." SER 264. The evidence against Hyatt was so overwhelming that Respondents' Counsel was forced to admit to the jury in another legal proceeding that Hyatt "was a horse's ass." SER 57.

The only other layoffs occurred months after Engquist's, and were the result of other significant events, including Respondents' failed trip to Korea to meet wheat clients, Engquist's termination (which reduced ESC clients), and Respondents' mismanagement. These other layoffs are not relevant under Respondents' standard, which focuses on "*the same time period.*" Br. 44. And they weren't comparable in any event, as those termination notices attributed layoffs to declining ESC revenue, unlike Engquist's. *E.g.*, 7 Trial Tr. 52, 145-46; 4B Trial Tr. 39; 10B Trial Tr. 41-42. That evidence fit Engquist's claim that the precipitous decline in ESC revenue was *caused* by her termination (and not an explanation for it).

[16] The trial court paid scrupulous attention to the similarly situated requirement, even granting Respondents' motion to exclude evidence before trial on the class-of-one theory unless it met the requirement. App. A-2.

*Second*, it is not enough for a plaintiff to establish that she was treated differently from similarly situated employees. She must also show that she was singled out for that discriminatory treatment—that the government intentionally targeted her. Some courts require class-of-one plaintiffs to demonstrate that they were targeted out of animus, vindictiveness, or malice as part of this inquiry.

The Parties agree that animus is an important factor in successful class-of-one cases. It is Respondents and the United States that disagree. Respondents view animus as a crucial additional requirement; the United States wants to eliminate the inquiry altogether. Petitioner takes a middle ground: animus need not be required but is likely to be relevant.

To begin, the United States erroneously describes Petitioner's position. U.S. Br. 26-30. Unlike the dissent below, Petitioner has never claimed that animus, by itself, is sufficient to state a class-of-one violation; rather it is a potential piece of (not the entire) puzzle. An individual may be treated differently from others similarly situated if the government has a rational basis for doing so, even when animus is present.

At the same time, as Petitioner has explained, there is no need for this Court to make animus an independent factor. Pet. Br. 43.[17] Instead, inquiries

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[17] Dissenting in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), Justice Breyer argued that "discrimination that rests solely upon 'negative attitudes,' 'fear,' or 'irrational prejudice,'" violates the Fourteenth Amendment. *Id.* at 381 (quoting *Cleburne*, 473 U.S. at 448, 450) (citation omitted). In response, the majority recognized that "presence alone" of irrational bias "does not a constitutional

into animus will almost always be a natural byproduct of litigation because it is intertwined with the intentionality requirement in employment litigation. Given the panoply of other employment protections, it is doubtful that eliminating class-of-one "animus" will preclude discovery and litigation on this topic. Pet. Br. 51-53. This case amply proves the point, as evidence of animus was discoverable for Engquist's Title VII claim, which survived summary judgment. J.A. 35-36.

In any event, Respondents do not dispute Engquist's claim that she "alleged malice and the jury can be said to have credited her evidence that she was discriminated against because of Respondents' ill-will instead of a legitimate government purpose." Pet. Br. 42.[18]

Moreover, the fact that the jury instruction treated animus as an *additional* requirement the jury had to

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violation make" because *Cleburne* stated that such negative attitudes must be "*unsubstantiated by factors which are properly cognizable.*" *Id.* at 367 (citation omitted). Taken together, this discussion of *Cleburne* suggests that courts may take note of evidence of improper motives so long as plaintiffs negate the proffered rationales.

[18] At trial, Respondents blocked Engquist's attempt to strike "arbitrary" from the jury instruction—something she sought to make a jury finding regarding animus absolutely clear. J.A. 69-71. Respondents cannot profit from the ambiguity they created. *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943); *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring).

To the extent the instruction was unclear (something Respondents do not claim), the *noscitur a sociis* canon removes the ambiguity. *See California* v. *Brown*, 479 U.S. 538, 543 (1987). And the jury's punitive damages award, based on the instruction "that Defendants' conduct was malicious or in reckless disregard of plaintiff's right," 10B Trial Tr. 142, is further evidence that the jury found malice.

find lays to rest the United States' concern (Br. 14) that Engquist's trial was improper. Animus did not substitute for the rational-basis, similarly situated, or intentionality requirements; it was a *separate* required finding. J.A. 63-64. Thus, while this Court need not decide whether animus is an independent requirement for class-of-one claims, if animus were required then reversal of the decision below would be necessary.

*Third*, case law further accommodates government needs by limiting actionable cases to materially adverse employment actions, thereby excluding minor complaints.[19] *E.g.*, *McPhaul* v. *Madison County Bd.*, 226 F.3d 558, 564 (7th Cir. 2000); *Bowman* v. *Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir. 2000) ("[*D*]*e minimis* employment actions are not materially adverse and, thus, not actionable."); see also *Rutan* v. *Repub. Party of Ill.*, 497 U.S. 62, 114 (1990) (Scalia, J., dissenting) ("The loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer.").[20]

*Fourth*, the law ensures that judicial scrutiny does not cripple government efficiency, not by withholding constitutional protections from public employees, but

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[19] The *de minimis* doctrine also precludes inconsequential constitutional claims. *See Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 87 (1973) (Marshall, J., dissenting).

[20] Claims may also be restricted to "tangible employment action[s]," requiring "a significant change in employment status" and not a "bruised ego" or a "reassignment to [a] more inconvenient job." *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 761 (1998) (internal quotation marks and citations omitted).

by establishing high standards of proof and carefully employing procedural tools such as pleading and discovery requirements. Pet. Br. 53-54; *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998) ("[V]arious procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element . . . ."); *id.* at 599 (suggesting "postpon[ing] all inquiry regarding the official's subjective motive until discovery has been had on objective factual questions"); *id.* at 601 (Kennedy, J., concurring) ("[T]he authority to propose [further] far-reaching solutions lies with the Legislative Branch, not with us.").

As the experience of nine circuits shows, class-of-one claims do not generate additional lawsuits or discovery. Plaintiffs already have other vehicles, such as Title VII, to bring such claims. Pet. Br. 51-52. Similarly, due process and equal protection claims—whether based on race or gender or having nothing to do with a suspect class—already obligate employers to defend their decisions. *E.g.*, *Harrah*, 440 U.S. at 199.

All of these factors, required under existing doctrine, place heavy burdens on class-of-one employees and prevent the constitutionalization of "everyday" employment decisions.

### D. This Court Need Not Eliminate Equal Protection Rights To Preserve At-Will Employment.

Petitioner's opening brief explained why class-of-one claims will not eliminate at-will employment. Pet. Br. 50 n.16. The United States nonetheless argues that at-will employment can only be preserved by terminating equal-protection rights of public employees. U.S. Br. 17-20. At best, these concerns

might result in a different balancing of the relevant interests in class-of-one cases involving at-will public employees; they do not justify eliminating the cause of action for all public employees.[21]

Nonetheless, Respondents themselves do not embrace the United States' claim. they acknowledge that class-of-one claims have not undermined at-will employment. Resp. Br. 40 n.14.[22] This is because the traditional rational-basis test combined with the other demanding factors that plaintiff-employees must overcome preserves at-will employment. Indeed, Respondents' *amici* show that at-will employment is still recognized in the states within the nine circuits that recognize class-of-one claims for employees. Pa. Br. App. A.

As commonly understood, at-will employees may be fired for "good reason, bad reason, or no reason at all." In practice, whatever the actual reason for the dismissal, a public employer can almost always articulate some plausible rationale (even after-the-fact) for terminating an at-will employee, be it performance, personality, or effect on the office environment. As the practice of nine circuits bears out, employees can almost never negate these purported rationales (unless, as here, the defendant

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[21] Because this case involves a contractual employee, there is no need now to consider adopting any of the mechanisms that would absolutely preclude at-will class-of-one claims, such as animus or the *de minimis* doctrine. So, too, this Court need not grapple with the question of whether an adverse employment action for "no reason," is for an implicit reason, government efficiency.

[22] *Amici* Pennyslvania et al. appear to agree. Pa. Br. 7-8 ("[M]any of these adverse effects could be minimized, if not eliminated, by a proper understanding and rigorous application of the correct principles").

expressly disclaims performance-based justifications, which it would have no reason to do for an at-will employee).

Furthermore, this Court has long recognized that the Equal Protection Clause trumps state statutory and common-law employment regimes. Preserving at-will employment could never be a sufficient basis to preclude an individual from claiming she was terminated out of racial or gender prejudice. Protections against discrimination, retaliation, dismissal in violation of public policy, and other "bad reasons" have severely limited at-will employment in the public sector (and any resulting concerns should be addressed as part of the balancing process).

Implied covenants of good faith and fair dealing do far more than class-of-one claims to further constrain public at-will employment. "The single, most important change in employment law over the past decade has been the demise of at-will employment" as "the result of court decisions" recognizing "an implied covenant of good faith and fair dealing," Deborah Markowitz, *The Demise of At-Will Employment and the Public Employee Conundrum*, 27 Urb. Law. 305, 305-06 (1995) (footnotes omitted). This covenant has been read to require employers to act "in good faith by treating all like employees alike." *Id.* at 313 (footnote omitted). And the covenant imposes many broad restrictions beyond similar treatment, so that "employers soon will no longer be able to terminate employees for no cause or bad cause." Deborah Ballam, *Employment At-Will: The Impending Death of a Doctrine*, 37 Am. Bus. L.J. 653, 686-87 (2000). Recognizing class-of-one claims does not end public at-will employment as either a practical or theoretical matter.

## CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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April 9, 2008

# ADDENDUM

## Excerpts from Proceedings in the Trial Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANUP ENGQUIST,

Plaintiff,

vs. No. CV-02-1637-AS

OREGON DEPARTMENT OF AGRICULTURE, JOHN SZCZEPANSKI, and JOSEPH (JEFF) HYATT,

Defendants.

**October 15, 2004**

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* * *

COURT TO COUNSEL

On Number 8, the evidence regarding the class of one, I'm going to grant the motion but permit the plaintiff to provide evidence of others similarly situated to take it out of the motion. I don't know if that's clear, but I'm going to grant the motion in limine with respect to Number 8 unless the plaintiff actually supplies evidence of others similarly situated.

Do you understand that, Mr. Brischetto?

MR. BRISCHETTO: I don't, but I'll need to think it through and maybe we can talk about it Monday.

THE COURT: Okay, good. What I'm saying is that -- let me help you out a little bit on the summary judgment. It may be if it's sufficient to get a fast summary judgment motion, but I still think there has to be evidence that similarly situated persons, in order to have a viable class of one claim, go to the jury.

MR. BRISCHETTO: Okay. I'm hearing that differently. Typically, a motion in limine, I would say, would exclude evidence. And you're not talking about order of proof, you're talking about at the end of the case, there need to be? I mean, because --

THE COURT: Well, I think the motion -- I didn't mean to interrupt, but I think the motion is that if evidence of discrimination based on class of one should be excluded

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unless there's a basis for a showing that there is similarly situated persons.

MR. COLLINS: That's correct.

**October 18, 2004**

[Page 39]

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MR. ABRAMS: Your Honor, there's a series of about 11 witnesses here from 14 to 25, all of which are primarily put on the witness list, as far as we can determine, to talk to how well plaintiff did her job, and it is not going to be the defendants' position the plaintiff did not do her job well.

So this really is putting her positive

[Page 40]

character into evidence before it's been attacked. And if we slip up and -- and, you know, we've had some

discussion in discovery about whether she left early, whether she did crossword puzzles, things like that. You know, I -- I would argue there may be some role for this in rebuttal, but I would argue all 11 of these witnesses should be excluded as cumulative and character evidence and character not in question.

THE COURT: Mr. Brischetto.

MR. BRISCHETTO: Well, they're offered on several bases. Number one, contrary to defendants' assertions, they are apparently going to put on evidence that Ms. Engquist was denied promotion because of claimed performance problems. And that evidence will be coming in in our case-in-chief. My understanding is that because it comes in our case-in-chief, that we have the opportunity to rebut it at that time.

So it will be relevant to Szczepanski's claim that she had performance problems and she would be denied promotion on that basis.

It would also be related to the termination claims and whether or not the terminations were arbitrary, vindictive and malicious. Even if we prove that the decision to lay her off was inappropriate, a jury could conclude that they terminated her improperly for

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performance reasons.

So in order to show that there is no other reason, we have to show that she was a good performer. It relates to the intentional interference with contract claim because it shows that she's a good employee and why are they doing this to her.

THE COURT: Well --

MR. ABRAMS: Your Honor, I think a couple things. Number one, termination, I think the evidence is going to be

that we look at the position, the function of the position. At no point is there any evidence that we laid off Ms. Engquist because we didn't think she was doing that position well.

As to the specifics that might have been taken into account in terms of the promotion. Now, if I know that project X was not handled well, it is not a counter to that that she did X, Y, and Z (a) fine and (b) fine. You can counter by bringing in evidence specifically saying you're wrong, she did X well.

Trotting 11 witnesses up there to talk about generally she performed still is character evidence, it doesn't go to the issues Mr. Brischetto raises.

THE COURT: Although I don't buy your allusion, or whatever it's called, to X, Y, and Z, because you could do that in certain instances.

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I'm going to preclude this on the plaintiff's case-in-chief. It can come in on rebuttal if in fact there's a question raised as to her performance in either in whole or in part.

**November 17, 2004**

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MR ABRAMS [TO JURY]: Ladies and gentlemen, the Judge will tell you that in a case such as this, it isn't up to you to decide whether you agree with the business judgments that were made by the agency. In this case, Mr. Hyatt and Mr. Szczepanski, it isn't a question of whether, as Mr. Brischetto suggests, other agencies were able to get past these cuts without cutting staff. It isn't a question of whether you think that is public policy, to cut staff.

The question is whether there was discrimination and whether these actions were based upon vindictiveness and

# AMICUS CURIAE BRIEF

16

3-26-08

No. 07-474

# In the Supreme Court of the United States

ANUP ENGQUIST, PETITIONER

*v.*

OREGON DEPARTMENT OF AGRICULTURE, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS


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## QUESTION PRESENTED

Whether or to what extent the Equal Protection Clause entitles a public employee to challenge a personnel action on the ground that it was improperly based on subjective criteria or characteristics unique to the employee herself, rather than on the employee's membership in an identifiable group or class.

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# In the Supreme Court of the United States

No. 07-474

ANUP ENGQUIST, PETITIONER

*v.*

OREGON DEPARTMENT OF AGRICULTURE, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

### INTEREST OF THE UNITED STATES

This case concerns whether a public employee may assert a class-of-one equal protection claim against a government employer, and if she may, what standard of review applies to her claim. The United States has a significant interest in those issues. The United States is the nation's largest public employer, with over 2,700,000 civilian employees. Federal law establishes detailed civil service rules governing adverse personnel actions and remedies. While the vast majority of federal employees enjoy protection under those rules, some classes of employees do not. See p. 21, *infra*. The Court's decision could have a material impact on the management of federal employees not governed by those civil service rules and the system for resolving federal grievances estab-

lished by Congress. The United States participated as an amicus in *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam), the principal decision on which petitioner relies in advancing her equal protection claim.

## STATEMENT

1. Petitioner worked at a laboratory operated by the respondent Oregon Department of Agriculture. Pet. App. 14. She applied to be a manager at the lab, but was not selected for the position. She alleges that she had previously made complaints to the laboratory director about the individual who was selected, and that he had been required to attend diversity and anger management training as a result of her complaints. *Id.* at 15. According to petitioner, once he was selected, this new manager worked with the Department's Assistant Director to "get rid" of her by eliminating her position. *Id.* at 15-16.

After her job was eliminated and she determined that no suitable alternative job was available through her rights under a collective bargaining agreement, petitioner brought suit in federal district court against the agriculture department and the two managers whom she alleged were responsible for eliminating her position. Pet. App. 16-17. She asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 42 U.S.C. 1981, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment; she also made a claim alleging interference with contract. Petitioner asserted a damages action against the individual respondents under 42 U.S.C. 1983, alleging that they violated the Equal Protection Clause by discriminating against her on the basis of her race, national origin, and gender and/or for "arbitrary, vindictive and malicious reasons." J.A. 10.

The district court granted summary judgment for respondents on petitioner's claims of sexual harassment and denial of procedural due process, but allowed the remaining claims to proceed to trial. The jury rejected petitioner's claim of discrimination based on her membership in a suspect class, Pet. App. 1, but found in her favor on the class-of-one claim, *id.* at 3-4. The jury also found in her favor on her substantive due process and contract interference claims and rejected her Title VII and Section 1981 claims. *Id.* at 18. The jury awarded compensatory damages of $175,000 and punitive damages of $125,000 on the class-of-one claim and $125,000 on the contract interference claim. *Id.* at 8-10, 18.

2. a. A divided panel of the court of appeals reversed the judgment on the class-of-one claim. Pet. App. 13-27. The court concluded that the Equal Protection Clause does not encompass such a claim by public employees and therefore set aside the compensatory and punitive damages award for petitioner on that claim. *Id.* at 23-27.

The court of appeals acknowledged (Pet. App. 20) that in *Olech*, *supra*, this Court held that a plaintiff who does not claim to have been discriminated against on the basis of membership in a class or group may assert an equal protection claim as a "class of one." The court explained that whether "to apply [*Olech*'s] class-of-one theory to decisions of public employment presents a significantly different question." *Id.* at 23. The court explained that "the government as employer has broader powers than the government as regulator," and that "the scope of judicial review [in the public employment context] is correspondingly restricted." *Id.* at 24.

The court of appeals concluded that permitting a public employee to bring a class-of-one claim would "upset long-standing personnel practices," and would be unnec-

relaxed scrutiny—unless an action is based on the employee's membership in an identifiable group or class.

Permitting public employees to bring class-of-one claims would significantly intrude on managerial discretion by constitutionalizing garden-variety personnel actions. Because interpersonal frictions and disputes permeate the workplace, an employee subject to adverse treatment will frequently be able to allege that her supervisor's negative views towards her were based on malice or ill-will. Petitioner has offered no limiting principle that would give supervisors clear guidance as to when courts would defer to a supervisor's discretion. And petitioner's theory would require the federal courts to referee run-of-the-mill decisions in the public workplace and subject public employers to compensatory and punitive damages claims for petty grievances.

B. A class-of-one claim also conflicts with the tradition of at-will employment under which an employee may be terminated for irrational or arbitrary reasons, or for no reason at all. At-will employment is completely at odds with the notion of a class-of-one claim. What distinguishes a class-of-one claim from a more typical equal protection claim is that the allegation is essentially that the government has not articulated any basis for the different treatment that could be tested for rationality. But in the at-will employment context, unlike the regulatory context, the employer *is* entitled to discharge the employee for no reason at all. Finding a constitutional violation in the inability to justify a difference in treatment would defeat the basic notions of at-will employment.

To be sure, today every State as well as the federal government has enacted legislation conferring civil-service protection to certain employees or permitting those employees to engage in collective bargaining. See App.,

*infra*, 1a-3a. But those schemes demonstrate that there is no need for additional *judicially*-created remedies to police the types of disputes that would be covered by petitioner's theory. Those schemes also are based on legislative policy choices about precisely how and when to restrict managerial discretion in the public employment context. A class-of-one claim based on the Constitution would trump those legislative schemes and confer rights on the very employees that the legislature intended to be employed at-will. There is no reason to believe that the framers of both the original Constitution and the Fourteenth Amendment—who were accustomed to the at-will regime—intended to subject public employers to the micro-management that would follow under petitioner's theory.

II. A. If this Court nevertheless decides that the Equal Protection Clause authorizes class-of-one claims in the public employment context, it should hold that ordinary rational-basis review applies to such claims. That review requires a claimant to show that there is no conceivable rational basis for the challenged action. And once a plausible basis is identified that is supported by the record, a court has no authority to probe further into the actual subjective motivation for a decision. Indeed, in the at-will context, even no reason is a rational basis, which suggests that applying the class-of-one theory to public employees is a mismatch.

B. Allowing public employees to negate a plausible rational basis for an employment action by establishing that the action was actually motivated by malice would transform rational-basis review into heightened scrutiny, even though that treatment conflicts with this Court's equal protection jurisprudence and would interfere with the government's ability to effectively manage its work-

force. The district court in this case erred in permitting the jury to determine that a supervisor's ill-will motivated the decision to eliminate petitioner's position. Respondents produced evidence—apparently undisputed—that the State was experiencing a budget crisis, Pet. App. 15, and the elimination of petitioner's position was a rational response to that budget crisis. No more was needed to dispose of petitioner's class-of-one claim.

## ARGUMENT

### I. A CLAIM OF ADVERSE TREATMENT BY A CLASS-OF-ONE PUBLIC EMPLOYEE IS NOT SUSTAINABLE UNDER THE EQUAL PROTECTION CLAUSE

In *Olech*, 528 U.S. at 564, this Court observed in the regulatory context that its previous cases "have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The plaintiff there had alleged that a village had demanded a 33-foot easement as a condition of supplying her property with municipal water, whereas that village had demanded only a 15-foot easement from similarly situated property owners. *Id.* at 565. The lawsuit was brought only after the city relented and ultimately treated the plaintiff like other homeowners. The question in this case is whether the equal protection holding in *Olech* extends to the public employment context—specifically, whether a public employee may bring suit under the Equal Protection Clause alleging differential treatment based on an employee's individual characteristics that do not involve the employee's membership in an identifiable class or group. The Court should answer that question in the negative.

### A. A "Class Of One" Claim Is Incompatible With The Nature Of Individualized Personnel Decisions

1. This Court has consistently recognized that the Constitution applies in a different and more limited manner when the government acts in a non-regulatory capacity—*i.e.*, when the challenged "governmental function operating * * * [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] internal operatio[ns]." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961) (*Cafeteria Workers*). In the particular context of public employment, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion). Accordingly, the "government as employer * * * has far broader powers than does the government as sovereign." *Id.* at 671 (plurality opinion). In light of those principles, "constitutional review of government employment decisions must rest on different principles than review of * * * restraints imposed by the government as sovereign." *Id.* at 674 (plurality opinion).

Even in a context that is generally as highly protected as the First Amendment, this Court has categorically foreclosed constitutional claims that have the potential to disrupt the workplace and impair the functioning of public employers. In *Garcetti* v. *Ceballos*, 547 U.S. 410, 424 (2006), the Court held that the First Amendment gives no protection "to the expressions an employee makes pursuant to his or her official responsibilities." The Court reasoned that subjecting such expressions to

First Amendment review "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their supervisors in the course of official business." *Id.* at 423.

Even where a public employee speaks as a private citizen on matters of public concern, the First Amendment applies in a more limited fashion in the public employment context. There, the Court has substituted a relatively forgiving balancing test for the rigors of strict scrutiny that apply when the government as regulator targets speech. Specifically, the Court has balanced the employee's interests against the government's interest in effectively performing its functions. *Pickering* v. *Board of Ed.*, 391 U.S. 563 (1968). Similarly, under the Fourth Amendment, public employers need not obtain a warrant to search an employee's property because such a requirement would unduly burden government business and would improperly transform everyday business incidents into constitutional matters. *O'Connor* v. *Ortega*, 480 U.S. 709, 721-722 (1987) (plurality opinion).

2. The above principles apply to class-of-one claims under the Equal Protection Clause, and strongly counsel in favor of limiting the Equal Protection Clause in the public employment context to claims that an employee was discriminated against based on her membership in some objectively identifiable group. When the government categorically excludes a class of workers, a court may review the employment classification to determine whether the objective, group-based distinction is rationally related to a legitimate government interest. *E.g.*, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979) (upholding city's exclusion of methadone users from transit employment); *Harrah Indep. Sch. Dist.* v.

*Martin*, 440 U.S. 194 (1979) (per curiam) (school board rule requiring continuing education for teachers); *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307 (1976) (mandatory retirement age for police officers).[1]

The same is not true of class-of-one claims. When an employee has a grievance based on her supervisor's application of subjective criteria in a manner that is unique to the employee, recognition of a cause of action would threaten "to 'constitutionalize the employee grievance.'" *Garcetti*, 547 U.S. at 420 (quoting *Connick* v. *Myers*, 461 U.S. 138, 154 (1983)). A class-of-one employment theory poses a particularly potent threat to the government's "managerial discretion" (*id.* at 423), because it could be the basis for a constitutional claim by almost any public employee challenging almost any workplace decision. A large proportion of personnel decisions involve (or could be claimed to involve) comparisons between individual employees (*e.g.*, who should be hired or promoted) or between an individual and a relevant group (*e.g.*, whether the employee is performing at the expected level). Personnel decisions often turn on factors that are both individualized and subjective or are based on intangible criteria that may be hard to quantify with exact precision. To maintain a functioning workplace, public employers, no less than private employers, must make distinctions among similar employees in ways that ultimately favor some and disfavor others, for reasons that might appear arbitrary, personal, and difficult to probe.

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[1] Such cases differ from class-of-one claims like petitioner's in two respects: 1) the challenged policies on their face draw distinctions based on membership in an identified class, and 2) such broad-based exclusions can be understood as efforts to regulate the workplace in ways that differ from an individualized employment decision.

As a result, any distinction that disfavors an employee is inevitably likely to be perceived as unfair or irrational by the adversely affected employee, even when it is made for wholly legitimate reasons. It thus will frequently be possible for an employee—or her lawyer—to re-characterize a supervisor's actions as being based on "malice" or "ill-will" against the particular employee. Pet. Br. 42; see *Campagna* v. *Massachusetts Dep't of Envtl. Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2003) (in the employment context, "it is not hard to imagine the bee hive of constitutional litigation that would be generated by this variant of the 'class of one' doctrine"). Petitioner's theory would thus transform garden-variety public-sector personnel actions into potential constitutional damages actions under Section 1983.

The unique dynamics of the workplace and necessity for subjective and individualized personnel decisions contrast sharply with the regulatory realm where decisions respecting citizens generally take place pursuant to arms-length transactions and where the principle of equal treatment and the application of neutral criteria are the norm. This is particularly true of the contexts in which this Court has principally applied the class-of-one analysis, namely, easements of and exactions on property. See, *e.g.*, *Olech*, *supra*; *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336 (1989). In a context like that, equal treatment is generally the norm and a deviation by assessing property value or insisting on easements in substantially different ways raises serious questions. The public employment context lies at the opposite extreme.

Unlike the regulatory context, personnel decisions routinely arise in a workplace environment where manager and employee interact on a daily basis in varied and

unique ways and where there are countless occasions for subjective perceptions of personal disfavor or dislike to arise. As Judge Posner has explained, when the alleged unequal treatment does not arise in the "paradigmatic 'class of one' case," *i.e.*, where a public official "comes down hard on a hapless private *citizen*," but rather "arises out of the employment relation, the case for federal judicial intervention in the name of equal protection is especially thin." *Lauth* v. *McCollum*, 424 F.3d 631, 633 (7th Cir. 2005) (emphasis added).

Petitioner concedes that "the public employer often must take into account the individual personalities and interpersonal relationships of employees in the workplace." Br. 48. Petitioner's amici similarly acknowledge that employers routinely make distinctions based on "interpersonal dynamics" and "collegiality," Epstein Amicus Br. 13, or even on a "vague feeling that the employee does not fit well in the position," NEA Brief 20. That is the nature of personnel decisionmaking and, except where such distinctions are based on otherwise unlawful characteristics, it has never been thought to be prohibited, much less unconstitutional. But neither petitioner nor her amici offers any assurance that every federal and state judge would have a unified judgment as to the circumstances in which such concerns would be sufficiently related to legitimate employment interests.

For instance, if a public employer refuses to hire or promote an individual because the decision-maker perceives that the individual is moody, humorless (or insufficiently serious), rude, too talkative (or too reticent), overly friendly (or too withdrawn), or has a bad attitude or even bad body odor, petitioner has not suggested that the employee would be foreclosed from arguing that such perceptions are not rationally related to the employer's

interests in any given case, or that the employee would be foreclosed from challenging the factual underpinnings of the supervisor's perceptions. Br. 47, 48 (an employer "*generally*" or "*may well*" be able to terminate an individual because he is "antisocial or insubordinate") (emphasis added); Br. 39 ("the plaintiff always has an opportunity to negate the government's asserted bases").[2]

Conversely, if it is the case, as the government contends and petitioner half-way concedes, that it is entirely rational, as a general matter, for supervisors in making personnel decisions to consider interpersonal relationships and subjective criteria, then any benefit of uncovering a truly irrational personnel action is not worth the high cost of potentially subjecting every employment action to review under the Equal Protection Clause. "[G]overnment offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143; see *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.").

This case well illustrates the point. Petitioner's class-of-one claim is premised on the allegation that respondent Hyatt terminated her because she "had been a thorn in Hyatt's side for years," particularly because petitioner's allegations that Hyatt had sexually harassed her caused Hyatt to have "to attend anger management and diversity training programs." Pet. Br. 3, 6. Retaliation for bringing a claim of sexual harassment is a serious

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[2] Of course, an employee would be free to argue that such idiosyncratic considerations were offered by the employer only as a *pretext* for discrimination based on unlawful factors such as race, gender, or religion. But if the real motivating factor is not unlawful, and instead idiosyncratic, a constitutional case should not lie.

matter. But the jury *rejected* petitioner's retaliation claim and her claim that she was terminated on the basis of her sex. Pet. App. 1, 3. Nonetheless, the jury perceived a constitutional violation because it found that Hyatt irrationally disliked petitioner based on their frequent run-ins over the course of their employment relationship. The jury, moreover, was permitted to probe into the subjective reasons for petitioner's termination, even though respondents offered the rational justification that petitioner's position was eliminated for budgetary reasons. *Id.* at 15-16; Pet. Br. 42 ("In this case, Engquist alleged malice and the jury can be said to have credited her evidence that she was discriminated against because of Respondents' ill-will instead of a legitimate government purpose."); see pp. 31-33, *infra*.

3. Petitioner argues that because the Equal Protection Clause by its terms applies to all "persons," "[t]here is no circumstance in which a person absolutely loses his or her rights under the Fourteenth Amendment." Br. 23. But the First and Fourth Amendments extend to the whole "people," which presumably includes government employees, and yet the precedents discussed above show that the Constitution applies fundamentally differently to public employment, especially when it causes the unleashing of damages claims. The First Amendment is no less "majestic" (Pet. Br. 10) or "direct" (Pet. Br. 14) than the Fourteenth Amendment, but as discussed, the Court has held that public employees have no First Amendment rights whatsoever for expressions pursuant to official duties. *Garcetti*, *supra*; see *City of San Diego* v. *Roe*, 543 U.S. 77, 80 (2004) (per curiam) ("[A] government employer may impose certain restraints on the speech on its employees, restraints that would be *unconstitutional* if applied to the general public.") (emphasis added).

Similarly, this Court has fashioned the scope of the protections guaranteed under the Fourteenth Amendment in light of the practicalities involved in the enforcement of the right. In the area of jury selection, only those peremptory strikes that are based on a suspect classification implicate the Equal Protection Clause. See, *e.g.*, *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Thus, prosecutors may, consistent with equal protection, "exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994). *A fortiori*, there can be no class-of-one claim that an individual juror was singled out because of individual characteristics that do not implicate a suspect classification. See, *e.g.*, *Purkett* v. *Elem*, 514 U.S. 765, 769 (1995) (per curiam).

The limited reach of the Equal Protection Clause in the jury-selection context reflects the practical reality that whatever benefit would accrue from subjecting all peremptory challenges to constitutional review for rationality is not worth the costs of defeating the purpose of peremptory challenges to permit subjective and idiosyncratic distinctions among individuals in jury selection. And that view is not overridden by the fact that the Equal Protection Clause says that "[n]o State shall 'deny to *any person* within its jurisdiction the equal protection of the laws.'" Br. 10 (quoting U.S. Const. Amend. XIV, § 1 (emphasis added by petitioner)). Rather, it simply reflects that the protection conferred by the Clause varies with the context in which it is asserted.

None of this is to suggest that the Equal Protection Clause does not apply in the public employment context. It clearly does. But the scope of the protection available must be interpreted in light of the unique considerations

presented by the public workplace. As discussed, when the basis for alleged discrimination is not rooted in the employee's membership in an identifiable group or class, the high cost of invasive judicial intervention in everyday personnel disputes is not worth the benefit of uncovering the rare case of an unquestionably irrational employment decision. That is particularly true given that the employee is likely to have remedies under state or federal law when the adverse action taken is material. See pp. 20-22, *infra*.

4. Petitioner argues that recognizing class-of-one employment claims would not lead to a large number of suits, because a class-of-one claim is difficult to prove, Br. 35-39, and because those circuits that have recognized such a claim have not seen a flood of claims, Br. 49-50. That contention is untenable.

As an initial matter, recognition of such claims by this Court would significantly enhance awareness of such claims among public employees and eliminate all uncertainty about their viability. More fundamentally, however, the objection to class-of-one claims stems neither from the number of reported decisions on the subject (of which there are many) nor the likelihood of ultimate success at any given trial, but rather from the potential that courts (and perhaps even juries) could second-guess a supervisor's subjective views that an employee's individual characteristics are legitimately employment-related. See *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2604 n.11 (2007) (limiting *Bivens* remedy based "on the elusiveness of a limiting principle for [the plaintiff's] claim, not [on] the potential popularity of a claim that could be well defined"). The constitutional rule that petitioner envisions would impose a direct burden on the day-to-day functioning of public employers who

operate either in an arena of at-will employment, see, *e.g.*, *Ball* v. *Arkansas Dep't of Cmty. Punishment*, 10 S.W.3d 873 (Ark. 2000), or under statutes or collective bargaining agreements that set forth clearly defined criteria as to which employees are protected and which employment actions are prohibited, see pp. 20-22, *infra*.

Petitioner is also mistaken that there are settled standards governing class-of-one claims that would provide predictable guidance to public employers. As this case demonstrates, a class-of-one personnel claim threatens to permit courts to probe the subjective motives of government supervisors and second-guess the rationality of interpersonal frictions in the workplace. See pp. 13-14, *supra*; pp. 31-33, *infra*. Furthermore, although petitioner acknowledges that a plaintiff must allege she was treated differently from employees who were "similarly situated" in all "relevant" respects, Br. 38, it is entirely unclear who those employees were in this case. Pet. App. 67 & n.3 (Reinhardt, J., dissenting) (petitioner's "failure to point to any individual situated identically to herself" was irrelevant because she proved to the jury that "malice was the cause of her termination"). This uncertainty provides another reason for refusing to recognize such claims.

### B. A Class-Of-One Claim By A Public Employee Is Inconsistent With The Tradition Of At-Will Employment In This Country

1. Petitioner's class-of-one employment complaint is fundamentally incompatible with at-will employment. Employment at will, including for public employers, has for centuries been the background rule of American law. *Cafeteria Workers*, 367 U.S. at 896 ("It has become a settled principle that government employment, in the

*Connick*, 461 U.S. at 146-147 (emphasis added); *Collins* v. *City of Harker Heights*, 503 U.S. 115, 128 (1992).

In light of those principles, it is settled that at-will public employees cannot bring employment grievances under the Due Process Clause of the Fourteenth Amendment absent a protected property or liberty interest. *Bishop*, *supra*; *Paul* v. *Davis*, 424 U.S. 693 (1976); *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564 (1972). It would be highly anomalous to conclude that public employees nonetheless may bring suit under the Equal Protection Clause as long as the employee alleges that her supervisor singled her out for unfavorable treatment based on the supervisor's allegedly irrational views towards the employee. Petitioner is thus mistaken in arguing (Br. 50 n.16) that employees who bring such claims would still have the burden of establishing that an adverse action was motivated by an impermissible consideration and thus could not be said to have "*tenure*." As a practical matter, "imposing a norm of equal treatment changes employment at will * * * into something very close to tenured employment because it is so easy to invent a case of unequal treatment by a supervisor." *Lauth*, 424 F.3d at 633.

At a minimum, petitioner's theory would give every at-will government employee at least a basis to litigate over his or her discharge, and that would defeat one of the basic features of at-will employment. Indeed, application of class-of-one analysis to the employment context is wholly incompatible with the notion of at-will employment. After all, the distinguishing characteristic of a class-of-one claim is that the plaintiff does not challenge the distinction actually drawn and articulated, but rather complains about differential treatment that has never been explained (and assertedly cannot be ex-

plained). A class-of-one action can be understood as an effort to force the government to articulate a rational basis for its action. But the distinguishing feature of at-will employment is that the employer need not give any reason for its action. While it is not incompatible with that regime to ensure that race was not the reason, or to test the rationality of a classification drawn on the face of a policy, it is fundamentally inconsistent with the notion of at-will employment to give the employee a constitutional entitlement to the underlying reason why the employee was fired. In this regard, at-will employment is analogous to peremptory challenges. In both contexts, what distinguishes the government action (from a for-cause standard) is that the government need not offer any explanation at all for its reason as long as it can show that a suspect classification was not the reason where there is a substantial basis for suspecting it might be at play. Injecting class-of-one analysis into either context would be wholly incompatible with the basic nature of the government action.

2. To be sure, the federal government and the States have chosen, as a matter of policy, to protect most public employees from being discharged or otherwise subjected to adverse employment actions for impermissible reasons. Every State has laws providing civil service protection to specified public employees or permitting certain employees to engage in collective bargaining. See App., *infra*, 1a-3a. Those existing protections, however, do not support recognizing a class-of-one, *judicially-created*, remedy, as suggested by petitioner. Pet. Br. 51-52. Rather, existing remedies founded upon statutes and contract counsel heavily *against* recognition of a new remedy by this Court. Pet. App. 25-26 & n.3; *Lauth*, 424 F.3d at 633. Moreover, because limita-

tions on at-will employment are largely statutory or contractual, rather than constitutional, decisions about the contours and extent of employment protection remain subject to the reasonable policy choices of the government itself.

For instance, the vast majority of federal employees are covered by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 2301 *et seq.*, "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983). Under that scheme, a supervisor may not "discriminate for or against any employee or applicant" based on race, color, sex, national origin, age, disability, marital status, or political affiliation, 5 U.S.C. 2302(b)(1), or based on "conduct which does not adversely affect the performance of the employee or applicant or the performance of others," 5 U.S.C. 2302(b)(10).

At the same time, however, Congress has provided different levels of protection under the CSRA for different categories of covered federal employees. For example, the CSRA furnishes "no remedy whatsoever for * * * adverse personnel actions against probationary employees." *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988); see 5 U.S.C. 7511.[4] Congress has also excluded from the CSRA certain other employees in sensitive positions. 49 U.S.C. 44935 note (Supp. V 2005) (employees performing airport screening functions). In those contexts, recognition of a class-of-one equal protection

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[4] The CSRA provides alternative remedies for probationary employees facing personnel actions. See, *e.g.*, 5 U.S.C. 1211, 1221, 2302(b), 3321.

claim would trump Congress's carefully considered decision to confer discretion on supervisors.[5]

Moreover, "[n]ot all personnel actions are covered by this system." *Bush*, 462 U.S. at 385 n.28. Nothing in petitioner's theory limits public employees to bringing class-of-one claims concerning only those personnel actions specified by the legislature as worthy of protec-

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[5] As petitioner notes (Br. 52 n. 18), in *Bush*, *supra*, this Court held that a federal employee lacked an inferred cause of action under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), to recover damages for an employer's violation of the First Amendment because federal civil service protections provide an alternative remedy. And even where the employee lacks any remedy under the civil service laws, that lack of remedy reflects a conscious legislative judgment that would preclude a *Bivens* action. See *Robbins*, 127 S. Ct. at 2598. Moreover, the United States takes the view that punitive damages are not available in a *Bivens* action. But that does not mean that the United States does not have an active interest in the resolution of this constitutional matter. It is no small matter for an employee to allege that a federal employer acted unconstitutionally in disciplining an employee, and there is also the matter of injunctive relief. This Court has never considered whether federal employees may bring official-capacity suits for injunctive relief, assuming that the claimant can identify a waiver of sovereign immunity. See *Dotson* v. *Greisa*, 398 F.3d 156, 179-180 (2d Cir. 2005) (noting circuit split), cert. denied, 126 S. Ct. 2859 (2006). As the government has explained, Gov't Br. at 45-49, *Whitman* v. *Department of Transp.*, 547 U.S. 512 (2006) (No. 04-1131), this Court's decisions suggest that federal employees could bring colorable constitutional claims for equitable relief to a judicial forum after exhausting those claims through the statutory administrative scheme. The government also has taken the position that employees with no administrative appeal rights can obtain direct review of colorable constitutional claims for equitable relief in district court. *AFGE Local 1* v. *Stone*, 502 F.3d 1027, 1034-1039 (9th Cir. 2007) (district court had jurisdiction to consider constitutional claim seeking equitable relief by probationary airport screener). Accordingly, the Court's decision in this case could affect claims available to at least some classes of federal employees.

tion. Petitioner's theory thus might apply not only to discharges, but also to promotions, decisions about benefits and transfers, and even perhaps such issues as office selection, project assignments, or the distribution of furniture. Imposing a norm of perfectly equal treatment for public employees could thus constitutionalize virtually *any* petty slight or grievance perceived by an employee who feels she has been treated differently for some idiosyncratic reason.

A constitutional rule permitting courts to review everyday personnel decisions of public employers would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti*, 547 U.S. at 423; *Jicarilla Apache Nation* v. *Rio Arriba County*, 440 F.3d 1202, 1209 (10th Cir. 2006) (McConnell, J.) (opining that *Olech* should not "transform the federal courts into 'general second-guessers of the reasonableness of broad areas of state and local decisionmaking: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system") (quoting *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004). Such an unprecedented intrusion into the decisionmaking of state employers should not be sanctioned absent a clear constitutional command—which is lacking here.

## II. IF PUBLIC EMPLOYEES MAY BRING CLASS-OF-ONE CLAIMS, RATIONAL-BASIS REVIEW PRECLUDES CONSIDERATION OF MOTIVE

If this Court nevertheless concludes that public employees may bring class-of-one claims, it should hold that ordinary rational-basis review—which requires a claimant to show that there is no conceivable rational

basis for the challenged action—applies to such claims, and reject petitioner's invitation to revamp rational-basis review in this particular context to include consideration of motive. See Br. 34, 42-45.

### A. Rational-Basis Review Does Not Inquire Into The Subjective Motives Of The Government Decisionmaker

1. "[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ.* v. *American Ass'n of Univ. Professors*, 526 U.S. 124, 127-128 (1999) (quoting *Heller* v. *Doe*, 509 U.S. 312, 319-320 (1993)); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 366 (2001) (Under rational-basis review, the government may act on the basis of "distinguishing characteristics relevant to interests the State has the authority to implement.") (quoting *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (*Cleburne*)). "[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the * * * facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Fitzgerald* v. *Racing Ass'n*, 539 U.S. 103, 107 (2003) (quoting *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992)); accord *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) ("The rationality commanded by the Equal Protection Clause does not require States to match * * * distinctions and the legitimate interests they serve with razorlike precision.").

Under that highly deferential standard, it is settled that the government need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15. Rather, the "burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Garrett*, 531 U.S. at 367 (quoting *Heller*, 509 U.S. at 320); *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("hypothesized justifications" are sufficient); accord *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

Thus, once a conceivable rational basis supporting a difference in treatment is identified, judicial inquiry "is at an end." *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Ibid.* (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960)). A classification fails rational-basis review only in the relatively rare case in which "the facts preclude[ ] any plausible inference" that a legitimate basis underlies the difference in treatment. *Nordlinger*, 505 U.S. at 16. Here, as elsewhere, the remedy for improperly motivated governmental decisions "lies * * * in the people, upon whom * * * reliance must be placed for the correction of abuses committed in the exercise of a lawful power." *McCray* v. *United States*, 195 U.S. 27, 55 (1904); see *Cleburne*, 473 U.S. at 440.[6]

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[6] Nor is there anything extraordinary about a court's refraining from inquiring into whether a decision that is objectively reasonable has been undertaken with a malicious intent. That is precisely the rule that is followed in Fourth Amendment cases. *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."). There is no reason a court should engage in a more probing inquiry

2. Much of the Court's rational-basis jurisprudence has involved judicial review of legislative decisions. This Court's cases make clear, however, that there is no basis for less deferential judicial review of administrative decisions. *Nordlinger*, 505 U.S. at 15-16 & n.8. As this Court explained in *Olech*, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." 528 U.S. at 564 (quoting *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445 (1923)).

The Equal Protection Clause does not prohibit negligent or inadvertent errors in the administration of law; it is only implicated when there is an intentional difference in treatment. *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 353 (1918). Thus, once a plaintiff shows an intentional difference in treatment, the inquiry is the same as that applicable to legislative classifications: absent proof of a suspect classification or interference with a fundamental right, the relevant inquiry is whether the administrative classification is rationally related to a legitimate public end. *Nordlinger*, 505 U.S. at 15-16 & n.18.

Petitioner argues (Br. 39) that *Cleburne* establishes that a classification fails rational-basis review if it is based on "irrational prejudice." Petitioner's reliance on *Cleburne* is misplaced. In *Cleburne*, the Court held that a city that generally permitted the operation of multiple

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when it undertakes rational-basis review under the Equal Protection Clause.

dwelling facilities violated the Equal Protection Clause when it failed to permit the operation of a group home for persons with mental retardation. Applying rational-basis review, the Court held that the record failed to reveal any rational basis for the city's decision to treat the group home differently from other multiple dwelling facilities. 473 U.S. at 448. The Court examined each of the four grounds for differential treatment suggested by the city, and it concluded that each asserted rationale did not afford a plausible basis for distinguishing between the group home at issue and other multiple dwelling facilities. *Id.* at 448-450. Only after having failed to identify any rational basis for the city's decision did the Court conclude that the decision could be explained only as resting on irrational prejudice against persons with mental retardation, an illegitimate basis for government action. *Id.* at 450; see *id.* at 448. *Cleburne* therefore does not hold that a plaintiff can bypass rational-basis review by producing evidence that a decision was motivated by subjective ill-will, and petitioner's contrary formulation is inconsistent with the accepted understanding of rational-basis review.

3. In *Olech*, this Court did not suggest that motive was relevant to a class-of-one claim. Rather, the Court concluded that the plaintiff's allegations that the Village irrationally demanded a larger easement from other similarly situated property owners seeking municipal water supply, "quite apart from the Village's subjective motivation, [were] sufficient to state a claim for relief under *traditional* equal protection analysis." 528 U.S. at 565 (emphasis added). Justice Breyer, in a separate opinion concurring in the result, expressed the view that the plaintiff's additional allegation of "vindictive action," "illegitimate animus," or "ill will" was "sufficient to min-

imize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.* at 566 (quoting *Olech* v. *Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), aff'd, 528 U.S. 562 (2000) (per curiam)). But that opinion was not for the Court.

In the wake of *Olech*, the courts of appeals have reached different conclusions about the extent to which motive is relevant to a class-of-one claim. Compare, *e.g.*, *Jicarilla Apache Nation*, 440 F.3d at 1211 ("pretext is not an issue"); *Tri-County Paving, Inc.* v. *Ashe County*, 281 F.3d 430, 439 (4th Cir. 2002); *Whiting* v. *University of S. Miss.*, 451 F.3d 339, 348-350 (5th Cir. 2006), cert. denied, 127 S. Ct. 1038 (2007), with Pet. App. 21; *Warren* v. *City of Athens*, 411 F.3d 697 (6th Cir. 2005); *Tapalian* v. *Tusino*, 377 F.3d 1, 5-6 (1st Cir. 2004); *DeMuria* v. *Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003); *Albiero* v. *City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001); cf. *Lauth*, 424 F.3d at 634.

Permitting a plaintiff to establish an equal protection violation by proving that a difference in treatment was actually motivated by ill-will cannot be reconciled with the decisions of this Court discussed above holding that, unless a classification is suspect or affects a fundamental right, the sole equal protection inquiry is whether there is a plausible basis for the classification. Indeed, a class-of-one claim at bottom is a claim that the government has not offered any rational basis for its differential treatment of the plaintiff. If the claim prompts the government to articulate a rational basis for its action, then the case is at an end. If the action was actually motivated by malice, that is no more relevant than in any other rational basis case.

Moreover, permitting a plaintiff to prove a bad motive caused the decision is not the appropriate way to

prevent garden-variety government decisions from turning into class-of-one claims. Rather, the way to do so is either by rejecting the claims in the public employment context altogether or, at a minimum, by applying traditional rational-basis review, which upholds government action based on any proffered rational basis supported by the record. Regardless whether motive may play any role in class-of-one claims in the regulatory context in which *Olech* arises, it should play no role in the public employment context in which this case arises.

4. Petitioner's proposed treatment of animus as a "proxy for other elements that a plaintiff must prove" (Br. 43) would invite highly intrusive inquiries into the motivations that underlie official action. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court specifically addressed the unique harms of motive inquiries. There, the Court explained that "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials." *Id.* at 816. In particular, "[n]ot only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Ibid.* In addition, there are "special costs to 'subjective' inquiries of this kind." *Ibid.* Because "the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions," questions of subjective intent "rarely can be decided by summary judgment." *Ibid.* Allegations of bad faith or malice are classic examples of an allegation that is easy to make and difficult to disprove. Moreover, when malicious intent is the ultimate issue, "there often is no clear end to the relevant evidence." *Id.* at 817. An inquiry into malicious intent thus "may entail broad-

ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Ibid.* Such inquiries "can be peculiarly disruptive of effective government." *Ibid.* Petitioner's contention that animus is often highly relevant or even dispositive in a class-of-one claim would have precisely that effect.

5. The above discussion does not mean that judicial inquiries into actual motive are never justified. Specific constitutional provisions contemplate an inquiry into actual motive. *Farmer* v. *Brennan*, 511 U.S. 825, 835-840 (1994) (Eighth Amendment); *Mount Healthy City Sch. Dist.* v. *Doyle*, 429 U.S. 274, 287 (1977) (First Amendment). Indeed, the Equal Protection Clause itself demands such an inquiry when a classification is suspect. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-266 (1977) (racial discrimination). When, as here, a court is reviewing official action under the Equal Protection Clause, however, and there is no suspect classification or fundamental right involved, the costs of an actual motive inquiry outweigh any possible benefit.

Moreover, as this Court has explained, there is an important distinction between bare allegations of malice and the allegations of intent that are essential elements of certain constitutional claims. *Crawford-El* v. *Britton*, 523 U.S. 574, 592 (1998). A general allegation of malice permits "an open-ended inquiry into subjective motivation." *Ibid.* In contrast, in the contexts in which the Court has approved a motive inquiry, "the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff * * * or to deter public comment on a specific issue of public importance." *Ibid.* It is therefore not surprising

that the Court in *Crawford-El* expressed its understanding that "[i]t is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim." *Id.* at 588.[7]

**B. Under Rational-Basis Review Petitioner's Claim Fails**

If this Court were to hold that a public employee may bring a class-of-one claim, there would be no basis to depart from the settled principles discussed above governing rational-basis review and certainly no reason to *heighten* the burden that employers would face in defending against such claims. Thus, an employee who brings such a claim would have to show that "she has been intentionally treated differently from others similarly situated." *Olech*, 528 U.S. at 564.[8] Once those

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[7] To be sure, if this Court were to recognize class-of-one claims against public employers, plaintiffs would not be limited to "class of one" theories and might allege statutory as well as constitutional violations, in which case motive might be the subject of discovery even without the class-of-one claim. That does not mean, however, that the cost of introducing motive would be negligible in every—or even in most—cases. Quite to the contrary, where an employee can marshal no proof that a suspect classification was the motive for the decision, the suit would be dismissed. But under petitioner's theory, that same plaintiff could seek to proceed to trial as long as she alleges that some form of "malice" motivated the decision, even if the malice resulted from ordinary employment frictions.

[8] Several of the courts of appeals that have recognized class-of-one employment claims have noted the importance of the requirement that the plaintiff identify sufficiently similar employees. See, *e.g.*, *Neilson* v. *D'Angelis*, 409 F.3d 100, 104-106 (2d Cir. 2005) (evidentiary requirements and standards of proof might perversely make it easier to prove a class-of-one claim than a race-based claim if the standard of similarity for class-of-one employment claims is not extremely high); *Maniccia* v. *Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999) ("quantity and quality of the comparator's misconduct [must] be nearly identical to prevent

decision by any government supervisor at any level can be transformed into a potential equal protection violation if the affected employee alleges a malicious motive. Because that theory is contrary to precedent, would significantly disrupt the operation of public employers, and could require state and federal courts to referee routine workplace disputes, it should be rejected.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2008

## APPENDIX

### STATE CIVIL SERVICE PROTECTIONS

**Alabama:** Ala. Code §§ 36-26-1 *et seq.* (LexisNexis 2001).

**Alaska:** Alaska Stat. §§ 39.25.010 *et seq.* (2006).

**Arkansas:** Ark. Code Ann. §§ 14-49-101 *et seq.*, 14-50-101 *et seq.* (1998).

**Arizona:** Ariz. Rev. Stat. § 41-783 (Supp. 2007); Ariz. Admin. Code §§ R2-5-101 *et seq.* (2007).

**California:** Cal. Gov't Code §§ 18500 *et seq.* (West 1995).

**Colorado:** Colo. Const. Art. XII, §§ 13, 14; Colo. Rev. Stat. §§ 24-50-101 *et seq.* (2006).

**Connecticut:** Conn. Gen. Stat. Ann. §§ 5-193 *et seq.* (West 2007).

**Delaware:** Del. Code Ann. tit. 19, §§ 1301 *et seq.* (2005).

**Florida:** Fla. Stat. Ann. §§ 110.201 *et seq.* (2002).

**Georgia:** Ga. Code Ann. §§ 45-20-1 *et seq.* (2002).

**Hawaii:** Haw. Rev. Stat. Ann. §§ 76-1 *et seq.* (2007).

**Idaho:** Idaho Code §§ 67-5301 *et seq.* (2006).

**Illinois:** 20 Ill. Comp. Stat. Ann. 415/1 *et seq.* (2001).

**Indiana:** Ind. Code Ann. §§ 4-15-2-1 *et seq.* (Michie 1996).

**Iowa:** Iowa Code §§ 8A.411 *et seq.* (West Supp. 2007).

**Kansas:** Kan. Stat. Ann. §§ 75-2925 *et seq.* (1997).

**Kentucky:** Ky. Rev. Stat. Ann. §§ 18A-005 *et seq.* (LexisNexis 2003).

**Louisiana:** La. Const. Art. X; La. Rev. Stat. §§ 42:721 *et seq.* (2006).

**Maine:** Me. Rev. Stat. tit. 5, §§ 7031 *et seq.* (2002).

**Maryland:** Md. Code Ann., State Pers. & Pens., tits. 1-15 (LexisNexis 2004 & Supp. 2007).

**Massachusetts:** Mass. Ann. Laws ch. 31, §§ 1 *et seq.* (LexisNexis 2007).

**Michigan:** Mich. Const. Art. XI, § 5.

**Minnesota:** Minn. Stat. Ann. §§ 43A.01 *et seq.* (West 2002).

**Mississippi:** Miss. Code. Ann. §§ 25-9-101 *et seq.* (West 2003).

**Missouri:** Mo. Ann. Stat. §§ 36.010 *et seq.* (West 2001).

**Montana:** Mont. Code Ann. §§ 2-18-101 *et seq.* (2007).

**Nebraska:** Neb. Rev. Stat. Ann. §§ 81-1301 *et seq.* (LexisNexis 2005).

**Nevada:** Nev. Const. Art. 15, § 15; Nev. Rev. Stat. §§ 284.010 *et seq.* (LexisNexis 2002).

**New Hampshire:** N.H. Rev. Stat. Ann. §§ 273-A:1 *et seq.* (LexisNexis 1999).

**New Jersey:** N.J. Stat. Ann. §§ 11A:1-1 *et seq.* (West 2002).

**New Mexico:** N.M. Stat. Ann. §§ 10-9-1 *et seq.* (Michie 2003).

**New York:** N.Y. Civ. Serv. Law §§ 200 *et seq.* (McKinney 1999).

**North Carolina:** N.C. Gen. Stat. §§ 126-1 *et seq.* (2007).

**North Dakota:** N.D. Cent. Code §§ 34-11-01 *et seq.* (2004).

**Ohio:** Ohio Rev. Code §§ 124.01 *et seq.* (Anderson 2001).

**Oklahoma:** Okla. Stat. Ann. tit. 74, §§ 840-4.1 *et seq.* (West 2002).

**Oregon:** Or. Rev. Stat. §§ 240.005 *et seq.* (2005).

**Pennsylvania:** 71 Pa. Cons. Stat. Ann. §§ 741.1 *et seq.* (West 1990).

**Rhode Island:** R.I. Gen. Laws §§ 36-4-1 *et seq.* (1997).

**South Carolina:** S.C. Code Ann. § 8-17-330 (Supp. 2007).

**South Dakota:** S.D. Codified Laws §§ 3-6A-1 *et seq.* (2004).

**Tennessee:** Tenn. Code Ann. §§ 8-30-101 *et seq.* (2002).

**Texas:** Tex. Loc. Gov't Code Ann. §§ 158.001 *et seq.* (West 2008).

**Utah:** Utah Code Ann. §§ 67-19-1 *et seq.* (2004).

**Vermont:** Vt. Stat. Ann. tit. 3, §§ 901 *et seq.* (2003).

**Virginia:** Va. Code Ann. §§ 2.2-2900 *et seq.* (2005).

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**West Virginia:** W. Va. Code §§ 29-6-1 *et seq.* (2004).

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# AMICUS CURIAE BRIEF

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IN THE
# Supreme Court of the United States

ANUP ENGQUIST,
*Petitioner*,

v.

OREGON DEPARTMENT OF AGRICULTURE,
JOSEPH (JEFF) HYATT, AND JOHN SZCZEPANSKI,
*Respondents*.

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Ninth Circuit**

## BRIEF OF PROFESSOR RICHARD EPSTEIN AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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February 27, 2008

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## INTEREST OF *AMICI CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed briefs as an *amicus* of this Court on numerous occasions. Institute attorneys currently handle more than 100 cases nationally, including many cases that concern the interplay between the government and its citizens.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their blanket consent to the filing of *amicus* briefs in this case are on file with the Clerk.

## STATEMENT

1. In 1992, petitioner Anup Engquist was hired as an international food standards specialist in an Oregon Department of Agriculture laboratory. *See* Pet. App. 14. During the course of her employment, Engquist developed an acrimonious relationship with respondent Jeff Hyatt. *See id.* at 15. By the fall of 2001, Hyatt and Engquist's supervisor, respondent John Szczepanski, "were working to 'get rid of'" Engquist. *Id.* Their efforts ultimately proved successful: Hyatt was chosen over Engquist for a managerial position for which both applied, *see id.*, and for which there was evidence that Engquist was better qualified. *See* JA 18. By late 2001, Hyatt had reduced Engquist's workload to the point where there was insufficient work to justify a full-time position. *See* JA 20. In January 2002, Engquist's position was eliminated in a reorganization of the laboratory. *See* Pet. App. 16. Although the state collective bargaining agreement permitted Engquist to "bump" to another position, she was found unqualified for the only position available to her. *See id.*

2. Engquist filed suit against the Department, alleging, *inter alia*, that the Department, Hyatt, and Szczepanski violated her rights under the Equal Protection Clause. In particular, Engquist alleged that she was singled out "for arbitrary, vindictive and malicious reasons." JA 10. After the district court denied defendants' motions for summary judgment on Engquist's equal protection claim, *see* JA 49-59, the case proceeded to trial.

Engquist "presented her case on the theory that Szczepanski and Hyatt were acting out of malice." Pet. App. 67 (Reinhardt, J., dissenting). The jury was instructed that, "[t]o bring a successful Equal

Protection claim under the 'class of one' doctrine, Plaintiff must prove that defendants treated her differently than [sic] others similarly situated[,] . . . that no rational basis exists for the difference in treatment[,] [a]nd . . . that Defendant took these actions for arbitrary, vindictive, or malicious reasons." JA 63-64. The jury returned a verdict in Engquist's favor, answering "yes" to a special verdict form question that asked whether "the individual defendants intentionally treat[ed] the plaintiff differently than [sic] others similarly situated . . . without any rational basis and solely for arbitrary, vindictive or malicious reasons." Pet. App. 3-4. The jury awarded Engquist $175,000 in compensatory damages and $125,000 in punitive damages on her equal protection claim. *See id.* at 4-5.

3. The court of appeals reversed, holding that Engquist's "equal protection claim is invalid as a matter of law." Pet. App. 59. The court concluded that *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) – which confirmed that the Equal Protection Clause protects individuals against government discrimination that lacks a rational basis – did not apply to the employment decisions of public employers. *See* Pet. App. 23-27. In the court's view, "[b]ecause the government as employer has broader powers than the government as regulator, the scope of judicial review is correspondingly restricted." *Id.* at 24. The court stated that public employees have a wealth of other legal protections available to remedy alleged arbitrary treatment, *see id.* at 25, and that allowing individual equal protection claims to proceed "would completely invalidate the practice of public at-will employment," *id.*, and "generate a flood of new cases," *id.* at 26.

Judge Reinhardt dissented. *See id.* at 59-69. He would have affirmed the judgment on the grounds that equal protection "class of one" claims could be asserted against public employers. *Id.* at 67.

## SUMMARY OF ARGUMENT

**I.** The Equal Protection Clause prohibits the government from intentionally discriminating against persons without a legitimate basis. In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), the Court confirmed that an individual who is singled out for disparate treatment solely for "irrational and wholly arbitrary" reasons has a claim under the Equal Protection Clause. The petitioner in this case established at trial that she was singled out for unfavorable treatment solely because of personal animus. Under this Court's precedents, that is sufficient to uphold her claim.

**II.** In spite of these clearly established principles, the court of appeals held that petitioner could not prevail as a matter of law because she was a public employee. That restriction on the reach of the Equal Protection Clause is without precedent or justification. The Equal Protection Clause applies to the actions the government takes in its role as employer as well as in its role as regulator. In particular, this Court has repeatedly applied the Equal Protection Clause to public employees. To be sure, the government does have "broader powers" as an employer than as a regulator. But these broader powers are not unlimited. Whatever the application of the contract-at-will doctrine in the private sector, it does not completely define the role of public employers in our system of limited government.

Government employees do not surrender their constitutional rights as a condition of accepting

public employment. This Court has accommodated the protection of individual rights and the needs of the public employer without immunizing government action from constitutional scrutiny. The analysis of public employees' speech, for example, or their right to be free from unreasonable searches, turns on a balancing of interests. That same balancing applies to the Equal Protection Clause.

The government's interest in avoiding unmeritorious litigation does not justify curtailing individuals' equal protection rights. The substantive and procedural standards governing rational basis equal protection claims give the government wide latitude. But that latitude does not extend to cases where a jury on proper instructions has reached the conclusion that the defendant acted without any justification at all. In all events, the costs of government compliance with the requirements imposed by the Equal Protection Clause protect significant individual liberty interests against arbitrary abuse of government power – a core purpose of the Equal Protection Clause.

## ARGUMENT

The Equal Protection Clause applies when the government singles out an individual for unequal treatment without any rational basis, including for reasons solely of animus or malice. That principle applies to government action directed at government employees, just as it does to other government actions. Policy-based arguments for immunizing state action from constitutional scrutiny are contrary to precedent and unpersuasive.

### I. THE EQUAL PROTECTION CLAUSE PROHIBITS THE GOVERNMENT FROM INTENTIONALLY DISCRIMINATING AGAINST INDIVIDUALS WITHOUT A RATIONAL BASIS

In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), this Court held that an individual who alleges that she has been "intentionally treated differently from others similarly situated," without any "rational basis for the difference in treatment," can claim a violation of the Equal Protection Clause. *Id.* at 564. The Court stated that allegations of "irrational and wholly arbitrary" treatment were "sufficient to state a claim for relief under traditional equal protection analysis." *Id.* at 565 (internal quotation marks omitted); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) ("the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause").

Under the "traditional equal protection analysis," the Court invoked in *Olech*, courts apply heightened scrutiny to government classifications based on race or sex because they "generally provide[] no sensible ground for differential treatment" and "are so seldom relevant to the achievement of any legitimate state

interest that *laws grounded in such considerations are deemed to reflect prejudice and antipathy.*" *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 441 (1985) (emphasis added); *see also, e.g., United States v. Virginia*, 518 U.S. 515, 531-32 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). Even when state action "neither burdens a fundamental right nor targets a suspect class," the Court will invalidate government action that "bears [no] rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also Heller v. Doe*, 509 U.S. 312, 319-20 (1993). A paradigmatic case of such irrational government discrimination involves action based on illegitimate animus or hostility against a group. Thus, in *City of Cleburne*, the Court held that requiring a special permit to construct a home for the mentally handicapped was not "rationally related to a legitimate governmental purpose" when it appeared that the policy "rest[ed] on an irrational prejudice against the mentally retarded." 473 U.S. at 446, 450. And, in *Romer*, the Court found that a Colorado constitutional amendment forbidding the extension of employment discrimination laws to include sexual orientation was "inexplicable by anything but animus toward the class it affects" and therefore unconstitutional. 517 U.S. at 632.

The same principle applies when the government singles out an *individual* for unfavorable treatment for reasons that are "irrational and wholly arbitrary." *Olech*, 528 U.S. at 565 (internal quotation marks omitted). "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular" or otherwise vulnerable

person "cannot constitute a legitimate governmental interest." *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis omitted); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1886) (concluding that the Equal Protection Clause does not "leave room for the play and action of purely personal and arbitrary power"). "'[T]he purpose of the equal protection clause . . . is to secure *every person* within the State's jurisdiction against intentional and arbitrary discrimination.'" *Olech*, 528 U.S. at 564 (emphasis added) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)); *cf.* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. Chi. Legal F. 73, 74 ("The most obvious and direct threats to any constitutional protection are legislative or executive actions that are directed toward a single person."). The "fundamental insight of the class-of-one cases is that vicious or exploitative discrimination can sometimes be found even when the victim does not belong to a group that is a familiar target of such treatment." *Bell v. Duperrault*, 367 F.3d 703, 712 (7th Cir. 2004) (Posner, J., concurring).

Petitioner made the very demanding showing required to make out a violation of the Equal Protection Clause in this case. The jury found that the defendants acted "without any rational basis" *and* "solely for arbitrary, vindictive or malicious reasons." Pet. App. 3-4. Whatever else may be sufficient to prove a claim of individual discrimination under *Olech*, a plaintiff who proves that the government acted out of animus or malice and with no other legitimate justification has established that "she has been intentionally treated differently from others

similarly situated," with no "rational basis for the difference in treatment," and in a manner that is "irrational and wholly arbitrary." *Olech*, 528 U.S. at 564-65 (internal quotation marks omitted).

## II. THE EQUAL PROTECTION CLAUSE APPLIES TO PUBLIC EMPLOYMENT DECISIONS

**A.** The Ninth Circuit held, despite these settled principles, that intentional and irrational discrimination against an individual *in the public employment context* does not implicate the Equal Protection Clause. That holding cannot be reconciled with this Court's precedents, which establish beyond dispute that the Equal Protection Clause applies to the government in its capacity as an employer.

The Fourteenth Amendment forbids "any State" from "deny[ing] to any person within its jurisdiction the equal protection *of the laws*." U.S. Const. Amend. XIV, § 1 (emphasis added). The Equal Protection Clause sweeps broadly. "[T]he prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, or whatever the guise in which it is taken." *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (citations omitted); *see also Avery v. Midland County*, 390 U.S. 474, 479-80 (1968) ("[t]he Equal Protection Clause reaches the exercise of state power however manifested"). When the government is acting in its capacity as an economic actor rather than as a regulator – as in making employment or contracting decisions – it nevertheless can act only pursuant to the authorization of law, and the Equal Protection Clause applies to those actions. *See, e.g., Collins v. City of Harker Heights*, 503 U.S. 115, 119-20 (1992) ("the Equal

Protection . . . Clause[] . . . afford[s] protection to employees who serve the government as well as to those who are served by them"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding that Equal Protection Clause applies to government contracting).

Specifically, this Court has consistently required that the government respect the rights of public employees to equal protection of the laws in their capacity as public employees. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality op.) (noting that "public employers . . . must act in accordance with [the] core purpose[s] of the Fourteenth Amendment") (internal quotation marks omitted); *Davis v. Passman*, 442 U.S. 228, 235-36 (1979) (recognizing right under the Equal Protection Clause to be free of gender discrimination in public employment). In keeping with that precedent, every circuit to consider the question has held that a plaintiff may sue a state or local government employer under 42 U.S.C. § 1983 for violations of the Equal Protection Clause. *See Annis v. County of Westchester*, 36 F.3d 251, 254-55 (2d Cir. 1994) (collecting cases).

**B.** This Court's decisions therefore should leave no room for dispute that the Equal Protection Clause applies to public employment decisions. As described above, it does. The court of appeals nevertheless carved out a policy-based exception to this Court's "traditional equal protection analysis," *Olech*, 528 U.S. at 565, by holding that evidence of irrational and wholly arbitrary action based on animus fails to implicate the Equal Protection Clause. That exception is without precedent or policy justification.

**1.** While this Court has recognized that the government's interests as an employer differ from its

interests as a regulator, this Court has repeatedly rejected the suggestion that government employees surrender their constitutional rights. Public employees cannot be fired for engaging in protected speech on matters of public concern. *See, e.g., Garcetti v. Ceballos*, 126 S. Ct. 1951, 1957 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment."); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). And "the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer." *National Treasury Employees Union v. von Raab*, 489 U.S. 656, 665 (1989); *see also O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987) (plurality op.).

Indeed, the Court has never held that a person surrenders constitutional rights as a consequence of acceptance of public employment. To be sure, "'the government as employer . . . has far broader powers than does the government as sovereign.'" Pet. App. 23 (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.)). Nevertheless, individual employees' constitutional rights still constrain the government's conduct. *See, e.g., O'Connor*, 480 U.S. at 717 (plurality op.) ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer."); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

This means that the government, as an employer, is constrained in its conduct towards its employees in ways that private employers are not. That

distinction is in the text of the Constitution: the Fourteenth Amendment applies to state action, not to the actions of private citizens. "[S]tate and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 897-98 (1961).

The Court has ensured, however, that the government's legitimate interests as an employer are taken into account in evaluating the constitutionality of its conduct. In the context of public employees' speech on matters of public concern, for example, the *Pickering* test asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 126 S. Ct. at 1958. That approach ensures that government employees "must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* The speech restriction must "balance . . . the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

Similarly, the Court has held that even though the Fourth Amendment's warrant requirement does not apply to government searches of its employees' property – because the government is not, in that circumstance, acting in a law enforcement capacity – the Amendment's general requirement that a search be reasonable in the circumstances carries its full force. *See National Treasury Employees Union*, 489 U.S.

at 665-66. Whether that criterion is met depends on the importance of the government interest in the search and the intrusiveness of the search, given the context. *See id.* at 668-72.

The same analysis applies here. The traditional contours of rational basis scrutiny protect the interests of both the government employer and the individual employees. The plaintiff in a rational basis case bears the burden of proving each element of her claim – that the government intentionally discriminated against her; that she was treated differently than others similarly situated; and that the discrimination was not rationally related to a legitimate government purpose. *See Olech*, 528 U.S. at 564. Furthermore, in this context, the Equal Protection Clause operates against the background norms of at-will public employment. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 345 n.8 (1976). The public employment relationship is one of mutual consent. *See Andrews v. Louisville & N.R.R. Co.*, 406 U.S. 320, 324 (1972). The need for constitutional scrutiny of such consensual relationships is diminished. *Cf.* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 67-73 (1988). Moreover, the range of legitimate government interests implicated by employment decisions is broad. A range of factors – skill, efficiency, interpersonal dynamics, collegiality, and the various needs of both the government and the employee – will be considered in further employment decisions. So long as an employment action is rationally related to the government's needs as an employer, the Equal

Protection Clause is not implicated (assuming no more searching scrutiny is warranted for other reasons).[2]

Nevertheless, the core limitation embodied by the Equal Protection Clause protects public employees, like other citizens, from the arbitrary exercise of state power. "The *Olech* class of one suit serves an important but relatively narrow function." *Cordi-Allen v. Conlon*, 494 F.3d 245, 255 (1st Cir. 2007). Here, the jury found that petitioner was singled out for adverse treatment based on the personal animus of her supervisor and co-worker and for no other reason. Petitioner therefore has made out a violation of the Equal Protection Clause.

**2.** The policy argument for wholly immunizing government employment decisions from constitutional challenge in this context is unpersuasive. At the outset, such an exemption would pose a substantial threat to the constitutional rights of millions of persons. The federal, state, and local governments employ more than 6.5 million people. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2008*, at Table 602 (Oct. 2007), *available at* http://www.census.gov/compendia/statab/2008 edition.html. Abrogating those employees' right to be free from illegitimate disparate treatment would expose them to risk of significant injury.

There is no serious argument that the government has an interest in protecting its ability to engage in "vicious or exploitative discrimination." *Bell*, 367 F.3d at 712 (Posner, J., concurring). The government

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[2] Furthermore, as a practical matter, many States provide statutory protections for public employees against adverse employment action that exceed the minimum protection afforded by the Equal Protection Clause.

*does* have a genuine interest in legal rules that do not encourage non-meritorious litigation and erroneous findings of liability. *See* Pet. App. 24; *cf.* David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73 (2005) (explaining, in the antitrust context, the social costs of litigation and erroneous findings of liability). But there is no evidence that application of ordinary equal protection standards in the public employment context sets the bar too low.

Substantively, rational basis review is the most deferential standard of constitutional scrutiny, designed to give the government "wide latitude," such that "even improvident decisions" are not subject to constitutional challenge. *See City of Cleburne*, 473 U.S. at 440. Moreover, when a legitimate reason justifies government action, an additional improper motivation will not render the action unconstitutional. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001). Once the government asserts a rational basis for its conduct – even after the fact – the burden is on the plaintiff to show that the asserted basis is in fact pretext for an illegitimate purpose. *See Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001).

In any event, the government must bear costs of compliance with the Fourteenth Amendment that private employers need not bear, because the Fourteenth Amendment applies to the former but not to the latter. For example, under the Due Process Clause of the Fourteenth (and the Fifth) Amendment, the government "may not constitutionally authorize the deprivation" of "a property interest in

public employment" without "appropriate procedural safeguards." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (brackets omitted). That is a procedural right unavailable to private employees but that is required by the Fourteenth Amendment's command that the government not deprive any person of his property without due process of law.

Nor does opening the door in this narrow class of extreme cases open the floodgates to disruptive future litigation. The *Olech* decision has generated relatively little follow-on litigation, and we are confident that the rules fashioned in this case in the district court below and in the other circuits assure that this result will carry over to employment cases. Quite simply, in most instances, statutory remedies against abuse by government officials offer paths of lesser resistance than the constitutional claim under the Equal Protection Clause. Allowing plaintiff's equal protection claim in this case will fill the gap in the rare egregious case outside the scope of statutory claims. The tradeoff therefore is this: Does this Court deny relief in rare cases of manifest and undisputed abuse because of the unproven fear of unlimited litigation? The correct answer to that question is not to slam the door, but to keep it ajar.

The government wields enormous power in its capacity as employer. Even though these powers are rightly broader than those that it exercises in its capacity as a regulator, they are not absolute. Given the vital interests at stake for individual employees, the Equal Protection Clause reflects the People's determination that the government should not act based solely on illegitimate animus – towards an identifiable group or towards an individual. The Court should reaffirm that principle here.

## CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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# Supreme Court of the United States

ANUP ENGQUIST,

*Petitioner,*

*v.*

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**Brief of Lambda Legal Defense and Education Fund, Disability Rights Education and Defense Fund, American Association of People with Disabilities, American Civil Liberties Union, Gay & Lesbian Advocates & Defenders, National Center for Lesbian Rights, Human Rights Campaign, and National Gay and Lesbian Task Force, as *Amici Curiae* in Support of Petitioner**

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## INTEREST OF AMICI CURIAE[1]

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. Lambda Legal has appeared before this Court as counsel to parties or as amicus curiae in cases concerned with discriminatory treatment of lesbians, gay men, and those with disabilities, including in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). Lambda Legal also has represented in lower courts numerous individuals subjected by their public employers to irrational discrimination on the basis of sexual orientation or disability. Based on this work, Lambda Legal well understands the importance of equal protection guarantees against invidious discrimination in the government workplace.

The Disability Rights Education and Defense Fund, Inc. ("DREDF"), based in Berkeley, California, is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979, DREDF is staff-

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[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent from the parties have been filed with the Clerk.

and board-led by individuals with disabilities and parents of children with disabilities. Recognized for its expertise in the interpretation of disability civil rights laws, DREDF pursues its mission through education, advocacy, and law reform efforts, fighting to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination.

The American Association of People with Disabilities ("AAPD") is a national membership organization founded in 1995 to organize the disability community to be a powerful force for change—socially, politically, and economically. With more than 100,000 members around the U.S., AAPD has a strong interest in how fundamental Constitutional protections are applied in the area of disability rights.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members that is dedicated to the principles of liberty and equality embodied in the Constitution. In particular, the ACLU submitted an amicus brief in this Court's most recent "class of one" case, *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), and has long advocated for the equal protection rights of public employees in varied contexts, both as direct counsel and as amicus curiae.

Founded in 1978, Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV

status, and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. That litigation has included the representation of gay men, lesbians, and individuals with HIV in employment discrimination claims against both public and private employers. In this Court, GLAD's work has included: *Bragdon v. Abbott*, 524 U.S. 624 (1998), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), *Healy v. Spencer*, 127 S.Ct. 1489 (2007) (amicus brief for Petitioner), *Miller-Jenkins v. Miller-Jenkins*, 127 S. Ct. 2130 (2007) (counsel for respondent on cert petition), *L.M.M. v. E.N.O.*, 528 U.S. 1005 (1999) (same), as well as a participant on numerous amicus briefs.

The National Gay and Lesbian Task Force (the "Task Force"), founded in 1973, is the oldest national lesbian, gay, bisexual, and transgender ("LGBT") civil rights and advocacy organization. With members in every U.S. state, the Task Force works to build the grassroots political power of the LGBT community by training state and local activists and leaders; conducting LGBT-related research and data analysis; and organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including equal access for LGBT people to opportunities for employment

The National Center for Lesbian Rights ("NCLR") is a nonprofit legal organization dedicated to achieving full equality for lesbian, gay, bisexual, and transgender people and their families. Since 1977, NCLR has litigated to end discrimination on the basis of sexual orientation and gender in family law, employment, education, immigration, and access to public accommodations. NCLR has litigated equal protection cases across the country on behalf of public employees who have been subjected to irrational discrimination based on their sexual orientation, gender, disability, or marital status.

Human Rights Campaign ("HRC"), the largest national gay, lesbian, bisexual, and transgender political organization, envisions an America where gay, lesbian, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 700,000 members and supporters nationwide committed to making this vision of equality a reality. The Equal Protection Clause is a critical constitutional protection for our membership and HRC is concerned by any decision that might undermine it. Especially in light of the lack of comprehensive federal law barring employment discrimination based on sexual orientation, it is critical that robust constitutional protections for gay and lesbian public employees, and others faced with invidious discrimination by the government, be preserved.

## INTRODUCTION AND SUMMARY

Amici are leading national organizations advocating on behalf of persons who, historically and today, have often been subjected to invidious discrimination. The Equal Protection Clause plays a vital role in protecting against irrational discrimination by the government against members of disfavored groups—including in the context of public employment.

Amici are concerned that the Ninth Circuit's decision in this case could undermine long-standing constitutional protections for public employees against illegitimate, invidious discrimination based sexual orientation, disability, age, or similar characteristics. On its surface, the decision below applies only to so-called "class of one" equal protection claims. But the Ninth Circuit's reasoning—that the Equal Protection Clause does not apply with full force in the context of public employment—might, if not reversed or at the very least carefully circumscribed by this Court, be extended more broadly to discrimination based on characteristics not already designated by the Court as "suspect classifications," such as sexual orientation, age, or disability. Indeed, some district courts have already applied the Ninth Circuit's decision to bar equal protection claims alleging unconstitutional discrimination based on age or disability. *See, e.g.*, *Robinson v. Pierce County*, No. C06-5354, 2008 WL 375199, at *11 (W.D. Wash. Feb. 11, 2008); *Beren v. Bd. of Trustees of Cal. State*

*Univ.*, No. C-06-4706, 2007 WL 2408884, at *1 (N.D. Cal. Aug. 21, 2007). And the Ninth Circuit itself, by listing an out-of-circuit case involving anti-gay animus as a "class of one" claim, implied that such claims would not be permitted under the decision below. *See* Pet. App. 22 (disagreeing with *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006)).

This Court should reject the Ninth Circuit's reasoning and reaffirm that the guarantee of equal protection applies with full force to all public employees. In reaching a contrary conclusion, the Ninth Circuit ignored this Court's decisions, including *Romer v. Evans*, 517 U.S. 620 (1996), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), which make evident that the Equal Protection Clause protects public employees from discrimination that lacks a rational basis. Without these protections, public employees could be vulnerable to unbridled discrimination on any basis, including characteristics such as sexual orientation, age, or disability even when those characteristics have no connection at all to legitimate government interests.

Amici agree with Petitioner and the vast majority of circuit courts to address the issue that the Equal Protection Clause protects "any person" against irrational discrimination by the government, *see Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam), and that these principles of equal protection extend to public employees. However, were the Court to reach a contrary

conclusion and decide to limit "class of one" equal protection claims, any restriction on such claims at minimum should be narrowly circumscribed and should not affect claims of discrimination based on sexual orientation, age, disability, or similar characteristics. The policy concerns adverted to by the Ninth Circuit for limiting "class of one" claims are not relevant when public employees allege irrational discrimination against a disfavored group. Nor should the Court determine that a separate showing of malice or animus is required. While malice or animus is *sufficient* to make out an equal protection violation on these bases, it is *not necessary*. Discrimination violates the equal protection guarantee when the classification lacks a rational connection to a legitimate government purpose, even absent a separate showing of animus or malice. Finally, if "class of one" claims were to be limited, they at least must be carefully defined so as to exclude cases like *Scarbrough*, where discrimination is based on membership in or association with a disfavored group.

## ARGUMENT

### I. The Equal Protection Clause Provides Critical Protection Against Invidious Discrimination Based on Sexual Orientation, Age, Disability, or Similar Characteristics.

The Equal Protection Clause plays a crucial role in protecting public employees from invidious discrimination based on traits such as sexual orientation, age, or disability. In asserting that conventional principles of equal protection "should

not be as expansive" in the context of public employment, Pet. App. 25, the Ninth Circuit's decision threatens to strip public employees of protections against invidious discrimination that is unrelated to job performance, or is motivated by animus or irrational prejudice.

This Court's precedents acknowledge that individuals may be particularly vulnerable to invidious and illegitimate discrimination based on certain characteristics beyond those already designated by this Court as "suspect" or "quasi-suspect" classifications. Lesbians and gay men have experienced disparate treatment based on ignorance, irrational prejudice, moral disapproval, animus, or a bare desire to harm. *See Lawrence v. Texas,* 539 U.S. 558 (2003); *Romer*, 517 U.S. 620.[2] Older workers may be "deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). And persons with disabilities may face adverse treatment based on irrational "negative attitudes, or fear." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("There can be little doubt . . . that persons with mental or physical impairments are confronted with

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[2] *Romer* held that Colorado's Amendment 2 did not further any "legitimate" state interest and accordingly could not survive even rational basis review. *Romer*, 517 U.S. at 635. This Court has not addressed whether lesbians and gay men may be a "suspect" or "quasi-suspect" class that would trigger a heightened level of scrutiny for classifications based on sexual orientation.

prejudice which can stem from indifference or insecurity as well as from malicious ill will").

The Equal Protection Clause guarantees that individuals belonging to these and other vulnerable groups are not left "entirely unprotected from invidious discrimination." *Cleburne*, 473 U.S. at 446. Unequal treatment fails even the most deferential equal protection review whenever there is no rational "relation between the classification adopted and the [legitimate] object to be attained," or when "the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 632, 634. Appropriate equal protection review thus ensures that members of each of these groups receive, at minimum, the basic guarantee of protection against discrimination without a rational basis or based on fear or animus.

In the lower courts, the Equal Protection Clause has played a particularly vital role in protecting individual gay men and lesbians from invidious discrimination in public employment. Courts have consistently recognized that "[a]bsent some rational relationship to job performance, a decision not to assign [plaintiff to an employment position] because of her sexual orientation runs afoul of the Fourteenth Amendment's equal protection guarantee." *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998). Likewise, courts have recognized that "a state action which discriminates against homosexuals and is motivated solely by animus towards that group necessarily violates the Equal Protection Clause, because a desire to effectuate one's animus against homosexuals can

never be a legitimate governmental purpose." *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 1998) (internal quotation marks omitted). Lower courts have thus consistently held that irrational or invidious discrimination against gay or lesbian public employees violates the Equal Protection Clause. *See, e.g., Beall v. London City Sch. Dist. Bd of. Educ.*, No. 2:04-cv-290, 2006 WL 1582447, at *15 (S.D. Ohio June 8, 2006); *Marcisz v. City of New Haven*, No. Civ. 3:04-CV-01239WW, 2005 WL 1475329, at *2 (D. Conn. June 22, 2005); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002); *O.H. v. Oakland Unified Sch. Dist.*, No. C-99-5123, 2000 WL 33376299, at *9-10 (N.D. Cal. Apr. 17, 2000); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347, 356-57 (E.D.N.Y. 1999); *Glover*, 20 F. Supp. 2d at 1174; *Weaver*, 29 F. Supp. 2d at 1289; *Tester v. City of New York*, No. 95 Civ. 7972, 1997 WL 81662, at *5-*6 (S.D.N.Y. Feb. 25, 1997); *Miguel v. Guess*, 51 P.3d 89, 97 (Wash. Ct. App. 2002).

Equal protection claims have also protected individual employees who are not themselves gay but are nonetheless targeted by their public employers because they associate with gay persons, are perceived to be gay, or have declined to discriminate against those who are. *See, e.g., Scarbrough*, 470 F.3d 250; *Emblen v. Port Auth. of N.Y./N.J.*, No. 00 Civ. 8877, 2002 WL 498634, at *11 n.12 (S.D.N.Y. Mar. 29, 2002).

Indeed, it is so well-established that the equal protection guarantee bars public employers from invidiously discriminating against lesbian and gay

employees that lower courts repeatedly have rejected government employers' attempts to invoke the defense of qualified immunity from such claims. *See, e.g.*, *Beall*, 2006 WL 1582447, at *15; *Emblen*, 2002 WL 498634, at *11; *Lovell*, 214 F. Supp. 2d at 325; *Miguel*, 51 P.3d at 99.

The Equal Protection Clause similarly sets a constitutional baseline protecting public employees from invidious discrimination on the basis of age, disability, or other historically disfavored characteristics. Independent of any applicable statutory protections, the Constitution itself sets a minimum guarantee against invidious discrimination that the legislature may not abrogate or repeal. The Equal Protection Clause thus ensures that no public employee is left entirely unprotected from invidious discrimination in the workplace. That vital protection must not lightly be withdrawn.

## II. Traditional Equal Protection Principles Should Apply With Full Force in the Public Employment Context.

The Ninth Circuit's decision potentially calls into question these long-standing protections for public employees. If interpreted to foreclose all equal protection claims alleging discrimination based on characteristics not already recognized as suspect or quasi-suspect classifications, the Ninth Circuit's opinion could leave lesbians and gay men, older employees, and employees with disabilities vulnerable to invidious discrimination by governmental employers. Indeed, several district courts have already applied the Ninth Circuit's

decision to dismiss equal protection claims alleging discrimination on the basis of age or disability. *See, e.g.*, *Robinson*, 2008 WL 375199, at *11 (dismissing claim for age discrimination); *Beren*, 2007 WL 2408884, at *1 (dismissing claim for disability discrimination).

The Ninth Circuit's decision cannot be reconciled with this Court's precedents. In concluding that "class of one" claims are a "constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens," Pet. App. 25, the Ninth Circuit drew an analogy to this Court's decisions in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *O'Connor v. Ortega*, 480 U.S. 709 (1987). The panel majority concluded from these cases addressing different constitutional provisions that *equal protection* rights may be restricted when the government acts as "employer" instead of "sovereign." But in the course of analogizing to other areas of the law, the Ninth Circuit overlooked several of this Court's precedents holding that the Equal Protection Clause does protect public employees from irrational or invidious discrimination, even when the discriminatory classification is not currently designated as suspect or quasi-suspect by this Court.

The Court has previously noted that the Constitution prevents the government from invidiously discriminating against gay or lesbian public employees. In *Romer*, the Court observed with particular concern that Colorado's Amendment 2 extended beyond the private sphere and purported to withdraw from gay men and lesbians protection

against discrimination in public employment, including generally applicable laws prohibiting "unfair discrimination" or arbitrary treatment. *Romer*, 517 U.S. at 629. Far from suggesting that gay men and lesbians who are employed by the government are not entitled to "conventional" equal protection principles, *id.* at 635, *Romer* reaffirmed the applicability of venerable principles to this sphere. "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government *and each of its parts* remain open on impartial terms." *Id.* at 633.[3]

The Court has also affirmed that the Equal Protection Clause prohibits irrational discrimination against public employees on the basis of age or disability. In *Kimel* and *Garrett*, the Court examined whether the protections in the ADEA and Title I of the ADA were "congruent and proportional" remedies for unconstitutional employment discrimination based on age and disability, respectively. As the "first step" in applying the congruent-and-proportional test, *Kimel* and *Garrett* undertook to "identify with some precision the scope of the constitutional right at issue" by examining the limitations that the Equal Protection Clause places on the states' treatment of their employees. *Garrett*,

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[3] Similarly, in *Webster v. Doe*, 486 U.S. 592 (1988), this Court rejected a federal agency's claim that the Administrative Procedure Act precluded an equal protection claim brought by a gay employee, instead confirming that "a constitutional claim based on an individual discharge may be reviewed by the District Court." *Id.* at 603-04.

531 U.S. at 365; *accord Kimel*, 528 U.S. at 83. In demarcating the "metes and bounds" of public employees' rights, *Kimel* and *Garrett* applied the "unremarkable and widely acknowledged" principles of rational basis review. *Garrett*, 531 U.S. at 367-68; *accord Kimel*, 528 U.S. at 83. *Garrett* also acknowledged that Congress had compiled several examples of state employment discrimination—and many more examples of discrimination by cities and municipalities—that might well have been unconstitutional under the rational basis test. *Garrett*, 531 U.S. at 369-70. Thus, as the Court has subsequently observed, *Garrett* addressed Congress's power to "enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment." *Tennessee v. Lane*, 541 U.S. 509, 521 (2004).

If there were any reason to think that the Equal Protection Clause did not apply with full force when the government acts in its capacity as employer, then surely *Kimel* and *Garrett* would have said so. Ultimately, *Kimel* and *Garrett* concluded that Congress had not compiled sufficient evidence of a "pattern of unconstitutional employment discrimination by the States" in order to abrogate their Eleventh Amendment immunity. *Garrett*, 531 U.S. at 368; *accord Kimel*, 528 U.S. at 89. But not once did the Court suggest that conventional equal protection principles were inappropriate or somehow inapplicable for public employees who are

discriminated against on account of age or disability.[4]

These precedents reflect the practical reality that public employees may often be vulnerable to the irrational prejudices of their supervisors or co-workers. "[K]nowledge of our own human instincts" teaches that invidious discrimination may arise from "simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374-75 (Kennedy, J., concurring). When the state cloaks a private individual with governmental authority, the Equal Protection Clause prevents him or her from abusing that authority in order to effectuate irrational prejudice or biases. Indeed, Congress enacted 42 U.S.C. § 1983 precisely to provide a federal remedy when individuals abuse positions of authority to discriminate invidiously "by reason of prejudice, passion, neglect, intolerance or otherwise." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658 (1978).[5]

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[4] In addition to *Kimel*, this Court has on three separate occasions evaluated equal protection claims based on age discrimination in public employment without ever deviating from the traditional rational basis test or suggesting that an alternative standard should apply to public employees. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam).

[5] *See also Screws v. United States*, 325 U.S. 91, 116 (1945) ("The danger was not merely legislative or judicial. Nor was it

Although the Ninth Circuit's opinion did not directly address claims by members of disfavored groups who are targeted for discrimination, amici are concerned that a broad interpretation of the opinion could strip all public employees of universal constitutional protections and leave them vulnerable to invidious discrimination based on irrational prejudices or pure malice. Nothing in this Court's precedents suggests that government employers are exempt from the requirements of the Fourteenth Amendment. "'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)).

## III. Any Exception to Traditional Equal Protection Principles Is Unwarranted, But If an Exception Were Made, It Should at Least Be Limited to "Class of One" Claims Narrowly Defined.

For the reasons outlined above, amici submit that the Equal Protection Clause should apply with full force in the public employment context—including to "class of one" claims. If, however, this Court were to

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threatened only from the state's highest officials. It was abuse by whatever agency the state might invest with its power capable of inflicting the deprivation").

conclude that some exception were warranted for "class of one" claims brought by public employees, then any such exception should be confined to true "class of one" claims. Conventional equal protection analysis should continue to apply to discrimination against public employees based on characteristics such as sexual orientation, age, or disability.

***First***, as Petitioner demonstrates, when this Court has adapted the commands of particular constitutional provisions to the unique conditions of public employment, it has not painted with a broad brush; instead, it has made careful adjustments that balance the legitimate interests of the government as employer against due respect for the constitutional rights of individuals. Pet'r Br. 23-29. Thus, if any limitation on equal protection claims could be justified in the public employment context—which amici believe is not the case—the limitation still must not extend beyond the legitimate needs of public employers that purportedly justify it. For the reasons asserted in Petitioner's brief, the policy rationales advanced by the Ninth Circuit do not warrant barring "class of one" claims by public employees. Even were this not the case, these rationales cannot justify any limitation on non-"class of one" claims, such as claims alleging discrimination based on sexual orientation, age, disability, or similar characteristics.

In a true "class of one" claim, the plaintiff alleges that he or she has been discriminated against as an individual, not because of any group characteristic shared with others. *See, e.g., Jennings v. City of Stillwater*, 383 F.3d 1199, 1213 (10th Cir. 2004)

(observing that "class of one" plaintiff is not part of a "group[] unified by the characteristic alleged to be the root of the discrimination"). Thus, disparate treatment is itself the defining characteristic that turns the plaintiff into a "class of one." The Ninth Circuit appeared to be concerned that without a defining "classification" to point to, an employee may claim to be a "class of one" even when he or she is fired or disciplined on legitimate performance-based or employment-related grounds. Pet. App. 25. The Ninth Circuit was further concerned that, because every public employee is potentially a "class of one," there was no limiting principle to stop a purported "flood" of litigation it feared could be generated by recognizing such claims. *Id.* at 26.[6]

Lacking merit in the "class of one" context, these concerns certainly do not justify limiting equal protection claims of public employees who suffer discrimination based on classifications defined by characteristics such as sexual orientation, age, or disability. When, for example, a gay or lesbian public employee is fired because of his or her sexual orientation, that personnel action is based on an articulable *classification* that channels traditional equal protection inquiry: Is the employee's sexual orientation rationally related to a legitimate interest of the public employer that is furthered by discrimination on this basis? As *Romer* reminds us, "[t]he search for the link between [such a] classification and [a legitimate government] objective

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[6] As the Engquist dissent noted, Pet. App. 65, no "flood" of "class of one" cases has actually materialized, and amici dispute that this is a valid concern justifying the majority's holding.

gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. In addition, the identification of a classification underlying an adverse personnel action provides a limiting principle for non-"class of one" claims. There is thus no reason why equal protection principles guarding against discrimination on the basis of characteristics such as sexual orientation, age, or disability should not apply with full force in the public employment context.

***Second***, some courts of appeals appear to require proof of malice or animus against an individual as a limiting principle for "class of one" claims, either in the public employment context or more generally. *Cf. Olech*, 528 U.S. at 565,66 (Breyer, J., concurring). But traditional equal protection analysis does not require a separate showing of malice or animus when a public employee (or any other person) is discriminated against due to characteristics such as sexual orientation, age, or disability.

To be sure, proof that a public employee has been fired solely because of class-based malice, ill-will, or animus is always *sufficient* to establish an equal protection violation. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer*, 517 U.S. at 634-35 (quoting *Dep't of Agric. v. Moreno*, 413 U. S. 528, 534 (1973) (internal quotation marks and ellipsis omitted)). Governmental action "exhibit[ing] such a desire to harm a politically unpopular group" plainly violates the guarantee of equal protection.

*Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment).

But a separate showing of animus or malice is *not* a *necessary* element of an equal protection claim. Discrimination is unlawful when there is no rational relation between a discriminatory classification and a legitimate government objective. *See, e.g.*, *Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"); *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring) (observing that invidious discrimination can result from "simple want of careful, rational reflection").

*Romer* exemplifies this principle. There the Court reiterated that "even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. And the Court found that Colorado Amendment 2 failed that test: "It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." *Id.* at 633. The Court therefore struck down the law under the "conventional and venerable" equal protection principle that "a law must bear a rational relationship to a legitimate governmental purpose and Amendment 2 does not." *Id.* at 635 (citations omitted).

To be sure, *Romer* also concluded that Amendment 2 stemmed from anti-gay animus. But

that conclusion was not based on any separate proof of such hostility. It was *inferred* from the absence of any rational connection between the classification and a legitimate government objective. *Id.* at 634-35 (explaining that "laws of the kind now before us raise the *inevitable inference* that the disadvantage imposed is born of animosity toward the class of persons affected," because the law "outrun[s] and belie[s] any legitimate justifications that may be claimed for it") (emphasis added); *see also Cleburne*, 473 U.S. at 450 (inferring from lack of rational reason for disparate treatment that zoning board's decision "appears to us to rest on an irrational prejudice").

In short, an equal protection violation can be shown in two ways. A plaintiff may demonstrate that the government action lacks a rational basis *either* by showing that it fails "to advance a legitimate government interest," *Romer*, 517 U.S. at 632, *or* by demonstrating that the challenged government action was motivated by "animosity" or "'a bare . . . desire to harm,'" *id.* at 634 (ellipsis in original). Even assuming *arguendo* that there are grounds for limiting "class of one" claims to the second prong by requiring proof of animus or ill will (which is not the case), no such departure from venerable equal protection principles is warranted when discrimination is based on classifications such as sexual orientation, age, disability, or similar characteristics.

***Third***, if despite the weight of argument against doing so the Court were to impose any restriction on "class of one" claims in the public employment

context, it at least should carefully define what is meant by a "class of one." A true "class of one" claim is one in which the plaintiff alleges discrimination based on his or her individual identity as such. In contrast, when discrimination is alleged due to actual or perceived membership in, or association with, a group marked by a particular characteristic, that is *not* a "class of one."

Some lower courts have made indiscriminate use of the "class of one" label to encompass all equal protection claims that do not allege discrimination based on a currently recognized suspect or quasi-suspect classification. *See, e.g.*, *Costabile v. County of Westchester*, 485 F. Supp. 2d 424, 433 (S.D.N.Y. 2007) (stating, in a case alleging disability discrimination, that "[b]ecause [plaintiff] has not alleged membership in a suspect or quasi-suspect class and has not been selectively denied a fundamental right, [the] claim is a 'class-of-one' Equal Protection claim").

The decision below illustrates the confusion that can result from this kind of application of "class of one" terminology. The Ninth Circuit identified the Sixth Circuit's recent decision in *Scarbrough*, 470 F.3d at 250, as a sister circuit precedent "apply[ing] *Olech*'s class-of-one theory to public employment decisions"—and thus as a decision which the Ninth Circuit was *rejecting*. Pet. App. 22; *see also id.* at 60 (Reinhardt, J., dissenting) (citing *Scarbrough* as case that "applied the class-of-one theory to employment" in conflict with decision below).

But *Scarbrough* is not a true "class of one" case. In *Scarbrough*, a public employer refused to rehire the plaintiff because he had agreed to speak at a church with a predominantly gay and lesbian congregation. Although *Scarbrough* mentions "class of one" claims while discussing the plaintiff's fundamental right to associate under the Due Process Clause, *see Scarbrough*, 470 F.3d at 261, the court resolved the plaintiff's equal protection claim by discussing group-based animus against gay men and lesbians. The Sixth Circuit held that the plaintiff's allegations supported an equal protection claim because "[t]he desire to effectuate one's animus against homosexuals . . . can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Id.* (internal quotation marks and citations omitted). By listing *Scarbrough* as a "class of one" claim, the decision below could be interpreted to leave public employees in the Ninth Circuit vulnerable to invidious discrimination motivated by their supervisors' irrational prejudices, animus, fear, or ignorance toward gay and lesbian employees, older workers, and employees with disabilities. Indeed, some district courts have already begun extending the Ninth Circuit's analysis in precisely this way. *See, e.g.*, *Robinson*, 2008 WL 375199, at *11 (dismissing claim for age discrimination); *Beren*, 2007 WL 2408884, at *1 (dismissing claim for disability discrimination).

In sum, the Ninth Circuit's decision should be reversed because it is an unwarranted deviation from this Court's precedents and the decisions that

prevail in the other Circuits. If this Court were to depart from conventional equal protection principles and limit "class of one" claims in the public employment context, it at least should carefully circumscribe that exception and make clear that it does not apply to claims of discrimination based on actual or perceived membership in, or association with, groups defined by sexual orientation, age, disability, or other characteristics not currently designated by this Court as suspect or quasi-suspect classifications.

## CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed or, at a minimum, limited as described herein.

Respectfully submitted,

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February 27, 2008

# AMICUS CURIAE BRIEF

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No. 07-474 3-26-08

# In The Supreme Court of the United States

ANUP ENGQUIST,

*Petitioner,*

v.

OREGON DEPARTMENT OF AGRICULTURE, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## *AMICUS CURIAE* BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS

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The League of California Cities and California State Association of Counties respectfully submit this brief *amicus curiae*, pursuant to Supreme Court Rule 37 and the consents of all parties.[1]

## INTERESTS OF THE *AMICI CURIAE*

The League of California Cities ("League") is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance

The California State Association of Counties ("CSAC") is a non-profit corporation with all of California's 58 counties as members. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is

[1] The parties have consented to the filing of all briefs *amicus curiae*. Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

There are approximately 1,425,123 local government employees employed within the State of California, a significant number of whom are employed by the cities and counties represented by the League and CSAC.[2] Thus, this case presents an issue in which members of the League and CSAC have a significant stake.

## SUMMARY OF ARGUMENT

This brief will provide the Court with the California cities' and counties' perspectives on the negative effects that would follow from acknowledgement of the "class-of-one" theory of equal protection in the context of public employment. As this Brief describes, this Court should affirm the Ninth Circuit's decision declining to apply the theory.

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[2] See U.S. Census Bureau, Local Government Employment and Payroll Data, March 2006, available online at http://www.census.gov/govs/www/apesloc06view.html. The cited figure includes counties, municipalities, townships, special districts, and school districts within California.

Section I of this Brief describes that applying the class-of-one theory would effectively eliminate public sector at-will employment. As Section I.A describes, an employer reserves the right to terminate at-will employees (which in the public sector includes probationary employees) for any reason, with limited exceptions. As Section II.B describes, however, applying the class-of-one theory, would open up virtually every public sector termination to federal court review for whether it has a "rational basis." Such review would apply not only to terminations but to other personnel decisions, including discipline, hiring, and promotion.

Section II describes that the vast majority of public employees already enjoy significant due process protections not afforded to private employees, including protection against employment decisions that appear to be arbitrary or lack a rational basis. California expressly recognizes the right of public employees to engage in collective bargaining, and collective bargaining agreements across the state provide for notice, appeal rights, and other protections against arbitrary or irrational personnel decisions. Several statutory schemes, including the Public Safety Officers' Procedural Bill of Rights and Firefighters' Procedural Bill of Rights, also explicitly provide for due process rights to specified public employees. Class-of-one equal protection is unnecessary to protect public employees' rights and would only serve to create additional unnecessary and unwarranted litigation.

Section III explains that application of rational basis review to all public employment decisions is not the simple and straightforward undertaking its proponents suggest. To the contrary, rational basis review would entail enormous judicial involvement in state employment decisions. As this Court noted in *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976), "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Section III describes that, moreover, due to the highly subjective nature of most employment decisions, rational basis review would lead to unpredictable and inconsistent results for public employers and employees.

Next, Section IV describes that the Ninth Circuit's refusal to extend the class-of-one theory of equal protection to the public employment context does not result in any deprivation of constitutional rights available to other litigants. To the contrary, it simply puts public and private sector employees on equal footing. Public employees continue to enjoy the right to assert class-of-one claims against the government in contexts *outside* of the employment relationship, the same as any private individual.

Finally, Section V describes that recognizing the class-of-one theory in the public sector probably would open the proverbial "floodgates" of litigation. This is demonstrated by the numerous unanswered questions regarding the application of rational basis review to public employment personnel decisions. The questions include whether the violation of any labor

statute would constitute a separate violation of equal protection, or whether such a violation would entitle the plaintiff to punitive damages under 42 U.S.C. section 1983 even if the underlying statute violated would not. Substantial additional litigation could result as the courts struggle to further define the contours of rational basis review as applied to the employment decisions.

For each of these reasons, the Court should affirm the Ninth Circuit's decision.

## ARGUMENT

### I. THE PRACTICAL EFFECT OF APPLYING THE CLASS-OF-ONE THEORY OF EQUAL PROTECTION TO PUBLIC EMPLOYMENT WOULD BE TO ELIMINATE AT-WILL EMPLOYMENT IN THE PUBLIC SECTOR.

The Ninth Circuit's decision, holding that the class-of-one theory of equal protection is inapplicable to personnel decisions by public employers, should be affirmed because at-will public employees are entitled to no substantially greater protection under state at-will employment laws than private employees. Stated another way, law-abiding public employers should have the right to dismiss at-will employees for any reason or no reason at all, even if arbitrary or irrational or merely perceived as such, as long as the reason is not unlawful.

California law provides an example of how at-will employment functions and how public employees, even at-will, already have significant protections against irrational employment decisions.

### A. At-Will Employment in California

Under California law, employment is, by default, "at-will." California Labor Code section 2922 expressly provides that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." That is, employment may be ended by either party "'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice." See, *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 335 (2000). Under California law, at-will employees may even be terminated for reasons that are arbitrary or irrational. See, e.g., *Silo v. CHW Medical Foundation,* 27 Cal.4th 1097, 1104 (2002); see also, *Carter v. Escondido Union High School Dist.*, 148 Cal.App.4th 922, 929 (2007) (at-will employment applied in the public employment context).

Of course, as discussed in the above-cited cases, there are limits to any employer's ability, whether public or private, to terminate even an at-will employee. Specifically, although employment at-will is terminable for any or no reason, or reasons that are arbitrary or irrational, an employer may not terminate an employee "for an unlawful reason or a purpose that contravenes fundamental public policy."

See, *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1094 (1992).

There are numerous prohibited/unlawful bases for ending an at-will employment relationship. For example, an employer may not terminate an employee if the termination would violate a fundamental public policy grounded in the constitution, a statute or an administrative regulation. *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 71 (1998). An employer may not unlawfully discriminate against an employee on the basis of his or her race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation. *California Government Code* § 12940. Nor may an employer terminate an employee on the basis that he or she engaged in certain delineated protected activities. See, e.g., *California Labor Code* § 132a (prohibiting taking adverse action against an employee who files a workers' compensation claim due to workplace injury); *California Labor Code* § 1102.5 (prohibiting retaliation against whistleblowers); *California Labor Code* § 6310 (prohibiting retaliation against employees who notify government authorities of unsafe working conditions); *California Government Code* § 12940, subdivision (h) (prohibiting taking adverse employment actions against employees who report or oppose unlawful discrimination or harassment).

As long as a termination is not expressly unlawful or does not run afoul of any public policy of the state, an employer is otherwise free to terminate an

at-will employee for any reason, or no reason at all. *Gantt,* 1 Cal.4th at 1094.

### B. Applying The Class-of-One Theory of Equal Protection to Public Employment Opens Every Personnel Decision to Constitutional Rational Basis Scrutiny, Including the Decision to Retain or Dismiss an At-Will Employee.

Applying the class-of-one theory of equal protection to public employment would effectively eliminate at-will public employment by subjecting all public employment personnel decisions (e.g., hiring, firing, transfers, promotions, etc.) to rational basis scrutiny. However, it offends core principals of equal protection, if not the equal protection clause itself, to afford at-will public employees greater protection under California's laws governing at-will employment than at-will private sector employees.

Although the underlying case arose in the employment termination context, the class-of-one theory could potentially apply to any personnel decision. Petitioner, citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), observes that to make out a successful class-of-one claim, the plaintiff must establish that: (1) the government treated him or her differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) the difference in treatment was not rationally related to any legitimate government purpose. 528 U.S. at 564. This is not necessarily a very high threshold to meet.

In addition, there is nothing about this formulation that limits it to employee terminations as opposed to other types of employment actions, including demotions or discipline. See also *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007) (declining to apply class-of-one theory to all "decisions made by public employers as to their employees").

Petitioner's assertion that class-of-one claims are difficult to prove and rational-basis review effectively limits successful class-of-one claims is unavailing. For one, the decision to dismiss or discipline or take any other personnel action against an employee generally results in differential treatment of the employee from other employees who are not subject to the personnel action, thereby satisfying the first element above. And any decision to take a personnel action affecting one employee instead of others is generally intentional, thereby satisfying the second element. Finally, personnel decisions, unlike regulatory actions, are oftentimes based on highly subjective determinations, which can easily be characterized in pleadings as "arbitrary" or "irrational." Therefore, a defendant's ability to overcome a class-of-one equal protection claim at the pleading stage is extremely limited.

As discussed above, California generally permits an employer to terminate an at-will employment relationship for no reason, or for an arbitrary or irrational reason, as long as it does not do so for an unlawful reason. *Gantt,* 1 Cal.4th at 1094. This is the law of the state of California as it pertains to at-will

employment and, thus, should apply to *all* at-will employees, whether in the public or private sector. U.S. Constitution, Amendment 14 § 1.

If class-of-one equal protection is extended to public employment, however, any time a public employer dismisses an employee (or makes any other personnel decisions such as discipline, hiring, promotion, transfer, etc.) the employer runs the risk of being dragged into court to defend against an equal protection claim. Not only is the public employer subject to suit, but the employee might be able to obtain punitive damages against individual defendants. *Smith v. Wade*, 461 U.S. 30, 35 (1983). Thus, as a practical matter, application of the class-of-one theory of equal protection to the public employment context effectively ends at-will public employment, while providing yet another theory of relief to the bundle of protections already available to public employees. For this reason, the Court should affirm the Ninth Circuit's decision.

## II. THE VAST MAJORITY OF PUBLIC EMPLOYEES IN CALIFORNIA MAY ALREADY AVAIL THEMSELVES OF SIGNIFICANT CONSTITUTIONAL AND OTHER PROTECTIONS AGAINST EMPLOYMENT DECISIONS LACKING A RATIONAL BASIS.

California law already provides a myriad of due process protections for the vast majority of public employees against employment decisions which lack a rational basis. Accordingly, there is no need for

class-of-one equal protection in the public employment context and the Court should affirm the Ninth Circuit's decision.

Although the rules differ from agency to agency, and some agencies admittedly only provide for at-will employment, the civil service rules of most public employers in California provide for "good cause" or "for cause" dismissals once an employee has completed his or her probationary employment period. Numerous counties and municipalities have created civil service commissions which provide a forum to independently review employee discipline and terminations. (E.g., the Los Angeles County Civil Service Commission, Los Angeles City Civil Service Commission, City of Long Beach Civil Service Commission, City of Napa Civil Service Commission, County of Sonoma Civil Service Commission, City and County of San Francisco Civil Service Commission, City of Coronado Civil Service Commission, etc.)

Furthermore, California law expressly recognizes the right of public employees to engage in collective bargaining. *California Government Code* §§ 3500, *et seq.*[3] These laws (or statutes) have resulted in

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[3] The Meyers-Milias-Brown Act, Government Code §§ 3500, *et seq.*, applies to employees of local governments, including cities, counties and special districts. Similar California provisions apply to other categories of public employees. See, e.g., the Dills Act or State Employer-Employee Relations Act, covering most employees of state agencies (*California Government Code* §§ 3512, *et seq.*), the Educational Employment Relations Act, covering employees of elementary, secondary and unified school

(Continued on following page)

countless memoranda of understanding and collective bargaining agreements between public employers within the State of California and the unions that represent their employees. Most of these agreements provide for notice, appeal rights and other protections against arbitrary or irrational personnel decisions.

In the specific context of peace officers, *California Government Code* §§ 3304, *et seq.*, the "Public Safety Officers' Procedural Bill of Rights," provides notice and administrative appeal rights for officers facing dismissal or other forms of discipline. Similarly, on January 1, 2008, *California Government Code* §§ 3250, *et seq.*, the Firefighters' Procedural Bill of Rights, became law. As with the Public Safety Officers' Procedural Bill of Rights, the Firefighters' Procedural Bill of Rights also provides notice and administrative appeal rights for firefighters prior to dismissal.

Also, under existing California law, public employees having these "for cause" rights are entitled to state law due process procedures before significant disciplinary action is implemented (i.e. the "*Skelly* Pre-Action Procedure"), as well as post-disciplinary appeal rights before a non-biased hearing officer or

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districts, community college districts and county offices of education (*California Government Code* §§ 3540, *et seq.*), the Higher Education Employer-Employee Relations Act, covering employees of the University of California and California State University System (*California Government Code* §§ 3560, *et seq.*).

body, where the employer bears the burden of proof. See, *Duncan v. Department of Personnel Admin.*, 77 Cal.App.4th 1166 (2000). Furthermore, if an aggrieved employee is still unhappy with the outcome following the appeal, *California Code of Civil Procedure* § 1094.5 provides for judicial review of the administrative decision in most circumstances. These additional due process safeguards are protections similar to, but arguably more effective than, rational-basis review as a defense against arbitrary and irrational employment decisions. These significant due process protections are not available to the public at large, but are instead reserved for public employees. Thus, the notion that public employees will be left with no means to protect against arbitrary employment decisions, absent extension of class-of-one equal protection to the public employment sphere, is incorrect. For this reason, the Court should affirm the Ninth Circuit's decision.

## III. ATTEMPTS TO DEMONSTRATE THE PRACTICAL FEASIBILITY OF RATIONAL BASIS REVIEW OF EMPLOYMENT DECISIONS, IN FACT, CONFIRM THAT SUCH REVIEW WILL ENTAIL ENORMOUS JUDICIAL INVOLVEMENT IN STATE EMPLOYMENT DECISIONS.

Application of rational basis review to public employment personnel decisions will not be the easy undertaking its proponents suggest. Rather, rational basis review will entail enormous judicial involvement in

state and/or local agency or public employer employment decisions.

In attempting to formulate a workable framework for rational basis review of employment decisions, Judge Reinhardt's dissent discusses the case *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004), which found for the plaintiff in a regulatory case under a class-of-one theory because the defendant harbored actual hostility and antagonism for the plaintiff. In discussing that case, Judge Reinhardt suggests that an employer might be able to act on his dislike of an employee if that dislike "has its roots in the employee's mediocre performance or lack of initiative, or in some other response to the individual not based on malice or irrationality, even if the employee has met the minimum requirements of the job." *Engquist,* 478 F.3d at 1013, fn.1. Given the subjective nature of even the most run-of-the-mill personnel decisions, the determination as to whether the "dislike" of an employee is "rational" is a very difficult one to make and, as such, will undoubtedly lead to unpredictable and inconsistent results. Moreover, availability of summary judgment to resolve such claims, which are likely to focus on factual disputes over intent and cause, may be sharply reduced.

Again citing *Squaw Valley*, Judge Reinhardt further suggests that a plaintiff in a class-of-one employment case could demonstrate the lack of a rational basis by showing that an asserted rational basis was merely pretext for different treatment.

*Engquist*, 478 F.3d at 1013-1014. Permitting a pretext inference in a class-of-one equal protection claim will lead to an anomalous result, however. By permitting a pretext inference, class-of-one claims become no harder, and in fact possibly easier, to prove than other types of employment claims. In an ordinary class-based discrimination claim, the plaintiff must demonstrate some class-based animus in order to prevail. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Under a class-of-one theory, however, the plaintiff need not allege discrimination based on a statutorily protected class before using pretext to show prohibited conduct. Rather, a jury could apparently legitimately find no rational basis – and therefore liability – in any termination case, simply because the jury disbelieved the employer's proffered reason.

## IV. THE NINTH CIRCUIT'S DECISION PLACES PUBLIC EMPLOYEES IN THE SAME POSITION AS PRIVATE EMPLOYEES AND PRIVATE CITIZENS WHO BRING CLASS-OF-ONE CLAIMS AGAINST THE GOVERNMENT IN NON-EMPLOYMENT CONTEXTS.

Petitioner and numerous *amici curiae* in support of petitioner, incorrectly suggest that the Ninth Circuit's decision itself violates the Constitution's mandate of equal protection of the laws by depriving citizens of fundamental rights which are available to other litigants. *Only* a public employee may assert an

equal protection claim against his or her *government employer*, in its capacity as *employer*. Private sector employees may not bring Fourteenth Amendment equal protection claims against their private sector employers because the Fourteenth Amendment protects only against state action. See, e.g., *United States v. Guest*, 383 U.S. 745, 755 (1966).

The Ninth Circuit's decision leaves public employees in no different a position than private employees. Although, under the Ninth Circuit's decision, public employees may not assert a *class-of-one* equal protection claim against their government employers in the capacity as employer, public employees retain their right to bring suspect classification equal protection claims against their employers. Moreover, public employees continue to enjoy the right to assert class-of-one claims against the government in contexts *outside* of the employment relationship, the same as any private individual (e.g., with respect to zoning, licensing, or other regulatory matters). There is simply no deprivation of any rights.

## V. EQUAL PROTECTION RATIONAL BASIS SCRUTINY OF PUBLIC EMPLOYMENT DECISIONS THREATENS TO OPEN UP THE FLOODGATES OF LITIGATION IF ONLY DUE TO THE UNANSWERED QUESTIONS REGARDING ITS SCOPE.

A number of important questions are not answered by the proponents of the class-of-one theory: (1) Does an employer's adverse action in violation of

anti-discrimination laws or the Fair Labor Standards Act ("FLSA"), for example, also *a fortiori* lack a "rational basis" and create additional 42 U.S.C. § 1983 liability? (2) Would this type of theory open up personal liability under Section 1983 for managers otherwise not subject to it under statutes like the FLSA or labor relations laws governing union-employer bargaining? (3) Does the availability of punitive damages against individuals under Section 1983 mean that those who prove violation of labor laws can also prove a lack of rational basis and thus obtain punitive damages against government employees, even when statutes like the FLSA and labor relations laws do not allow for punitive damages? These are among the numerous questions that district courts, appellate courts, and even this Court will be required to address in the future should the class-of-one theory of equal protection be extended to employment decisions. These questions demonstrate the potential for widespread expansion of "rational basis" review of public employment decisions, an expansion which the Ninth Circuit's decision in this case confirms is unwarranted. For this reason, the Court should affirm the Ninth Circuit's decision.

## CONCLUSION

For the foregoing reasons and those set forth in the brief for Respondent Oregon Department of Agriculture, as well as other *amici curiae* in support of Respondent, *amici curiae* League of California

Cities and California State Association of Counties urge the Court to affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

March 26, 2008

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# AMICUS CURIAE BRIEF

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**ANUP ENGQUIST,**

***Petitioner,***

**v.**

**OREGON DEPARTMENT OF AGRICULTURE, *ET AL.*,**

***Respondents.***

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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# BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. AND THE NORTH CAROLINA TROOPERS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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## INTEREST OF THE AMICUS CURIAE[1]

The National Association of Police Organizations, Inc. ("NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, are national non-profit organizations which represent law enforcement officers throughout the United States. NAPO is a coalition of police associations that seeks to protect the rights of law enforcement officers and to enhance public safety through legal advocacy, education and legislation. NAPO represents over 1,000 law enforcement organizations, with over 238,000 sworn law enforcement officers and 11,000 retired officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement profession.

The North Carolina Troopers Association, Inc. (NCTA) is a voluntary, non-profit association of over one thousand members of the North Carolina Highway Patrol. NCTA has worked for over thirty years to enhance public safety and protect its Troopers. In recent years, many North Carolina Troopers have been subjected to egregious arbitrary treatment by the N.C. Highway Patrol comparable to the arbitrary decisionmaking at issue in this case.

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[1] Counsel of Record for all parties received notice at least 10 days prior to the due date of the *amici's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or counsel made a monetary contribution to its preparation or submission.

These employment practices have had adverse effects on both agency efficiency and public safety.

NAPO, NCTA and the American law enforcement profession have a vital interest in the equal protection issues before this Court. The Ninth Circuit's bold holding is inconsistent with this Court's precedent, numerous other decisions and settled professional law enforcement personnel standards. The Ninth Circuit's decision to eliminate core equal protection rights is a fundamental impediment to proper personnel administration in law enforcement.

Experience has unfortunately demonstrated that law enforcement officers are particularly vulnerable to abuse by unelected bureaucrats and politicians who indulge in arbitrary, discriminatory and retaliatory employment practices against officers. This is especially true in the south, where collective bargaining is prohibited by law. The class-of-one equal protection doctrine is among the few remaining constitutional safeguards allowing police officers to protect their careers by challenging arbitrary personnel decisions and disparate treatment by their employers. NAPO and NCTA submit this brief to assist this Court in its resolution of this enormously important case.

## SUMMARY OF ARGUMENT

America's law enforcement officers form a unique class of professionals[2] who sometimes suffer from arbitrary abuse of government power by their employers. Police officers and public employees are constitutionally entitled to equal protection in employment under the class-of-one doctrine reaffirmed in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). The class-of-one equal protection principle is particularly necessary in non-collective bargaining jurisdictions where there is no check on abusive government power.

This Court, like every other Circuit that has spoken on the issue but the Ninth, has long held that the Equal Protection Clause applies to public employment just as it does in many other contexts where citizens need protection from governmental arbitrariness and disparate treatment. More specifically, since *Willowbrook*, several Circuits have continued to find that the class-of-one principle applies to public employment. Most also hold that a showing of malice is not required. The Ninth

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2. In 2004, there were 14,254 police agencies, employing 675,734 sworn police officers and 294,854 civilians, serving the 278 million persons in America. See Uniform Crime Statistics in www.fbi.gov/ucs/cius_04/law_enforcement_personnel. Crime fighting has taken its toll on American police officers, who often develop illnesses and disabilities from their high stress profession, resulting in an average life span of only 57 years. Since 1792, when Deputy Sheriff Isaac Smith became the first police officer to die in service, more than 17,900 police officers have been killed in the line of duty. See http://lawenforcementmuseum.org/TheMemorial/facts.htm More than 56,000 police officers are assaulted each year. Id.

Circuit's holding and reasoning is contrary to this Court's equal protection jurisprudence because:

1) equal protection has historically protected police officers from arbitrariness and disparate treatment by their employers; and

2) there is no legitimate justification for excluding police officers from this settled foundation of core constitutional protection; and

3) unique aspects of the police personnel environment necessitate class-of-one equal protection as a tool to protect police officers from unlawful arbitrariness and disparate treatment by employers.

Police officers need class-of-one equal protection because:

> Law enforcement officers across America face great challenges every day as they fight the war against crime and drugs. They are on the front line; their lives are in constant jeopardy. All of us owe them our gratitude and our respect... *[T]oo often law enforcement officers lose their jobs for frivolous reasons - or for no reason at all. For example, an officer may have a difference of opinion with a superior."*

Senator Jesse Helms, Congressional Record, January 31, 1991, Vol. 137, No. 21, 102nd Congress (emphasis added).

This Court has long recognized the unique working environment of police officers and that the constitutional rights of police officers are entitled to great weight. This Court has held that law enforcement officers are not required to make do with a "watered down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Lower courts have historically followed this Court's teachings that constitutional protections for America's law enforcement officers are critically necessary. See e.g. *Konraith v. Williquette*, 732 F. Supp. 973, 978 (W.D. Wis. 1990) (constitutional rights of law enforcement officers "must be afforded great weight"); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981).

If police officers are not afforded equal protection in employment, the many problems that fester in abusive police work environments will continue to grow, therefore further jeopardizing officers, public safety and ultimately the American criminal justice system. In many jurisdictions, collective bargaining and freedom from arbitrariness are unavailable to police officers, thus the class-of-one principle provides crucial residual protection in those states.

## ARGUMENT

### I. CLASS OF ONE EQUAL PROTECTION PROVIDES IMPORTANT PROTECTIONS TO POLICE OFFICERS WHO HAVE HISTORICALLY BEEN SUBJECTED TO ARBITRARINESS IN EMPLOYMENT.

America's police officers serve in an employment environment where employers enjoy considerable discretion. Substantial parts of America, especially the many and growing states of the South, prohibit public sector collective bargaining by statute. See, e.g., N.C.G.S. 95-98; Beaird, *Public Employee Labor Relations in the Southeast - An Historical Perspective*, 59 N.C.L. Rev. 71 (1980). In North Carolina, for example, bargaining with law enforcement agencies as an organized unit is a misdemeanor crime. N.C.G.S. 95-99. These jurisdictions afford little or no protection from arbitrary and disparate treatment, thus leaving police officers without any means to protect their careers. For example, Sheriff Joe McQueen of Wilmington, North Carolina, has proclaimed that officers "serve at the whim of the Sheriff." See *The Impact Of Willowbrook On Equal Protection And Selective Enforcement,* which appears in, *Section 1983 Litigation* (Practicing Law Institute; 2000; 641 PLI/LIT 469). Scores of cases demonstrate how some police employers make employment decisions based upon arbitrary, retaliatory and discriminatory

considerations.[3] Most of the egregious police personnel cases arise from southern jurisdictions where collective bargaining is unavailable.

Police officers still have to occasionally endure explicit ticket or charge "quotas" in order to remain employed in some areas. See *Gravitte* v. *N.C. Division of Motor Vehicles*, 33 Fed. Appx. 45 (4th Cir. 2002)(officer disciplined for non-compliance with explicit ticket quotas). This archaic quota practice requires coerced criminal charges predicated upon an arbitrary production quota. Disciplinary decisions predicated upon non-compliance with ticket or charge quotas is another example of arbitrariness in personnel decisionmaking.

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3. E.g., *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007)(police officers reassigned after informing prosecutor that the chief of police had harbored a felon); *Green v. Barrett*, 226 Fed. Appx. 883 (11th Cir. 2007)(jailer fired for testifying that the jail was unsafe); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006)(correctional officer fired for communicating to her state senator and State Inspector General about sexual harassment); *Kirby v. Elizabeth City*, 388 F.3d 440 (4th Cir. 2005)(officer disciplined for testifying about malfunctioning police equipment); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999)(officer disciplined for teaching off-duty firearms safety class); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. *en banc* 1997) (firing for political activities); *Worrell v. Bedsole*, 1997 WL 153830 (4th Cir. 1997)(deputy fired for reporting failures in providing safe police equipment); *Carroll v. N.C.D.E.N.R*, 358 N.C. 649, 599 S.E.2d 888 (2004)(officer disciplined for nominal speeding while responding to medical emergency); *Newberne v. N.C. Department of Crime Control and N.C. Highway Patrol*, 359 N.C. 782, 610 S.E.2d 201 (2005)(retaliation against whistleblowing Trooper); *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419 S.E.2d 277 (1992)(officer fired for reporting malfunctioning police firearms), and other cases cited herein.

A leading example of arbitrary decisionmaking in the police personnel context is *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981). There, the Fifth Circuit reversed summary judgment and imposed judgment as a matter of law for an officer who had been terminated after he was convicted of a misdemeanor firearm and provocation offense. Three other officers were retained despite their convictions for assault and battery. The Court reasoned that there was no justification for the disparate treatment between the Plaintiff and his three comparator officers. The *Ziegler* non-arbitrariness principle has been recognized in police personnel training and applied for nearly thirty years.

Police officers have occasionally sought and obtained relief under the Equal Protection Clause for different kinds of arbitrariness by police employers. E.g., *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (equal protection verdict for trooper affirmed; disparate treatment in leave benefits); *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994)(affirming verdict for deputy sheriff victimized by disparate treatment and sexual harassment); *Hayes v. North State*, 10 F.3d 207 (4th Cir. 1993)(partial summary judgment for police officers affirmed in case involving disparate treatment in promotions); *Wood v. Mills*, 528 F.2d 321 (4th Cir. 1975)(disparate treatment in pay among jailers held to violate equal protection).

The leading treatise examining police personnel issues describes cases of unlawful and sometimes egregious police discipline. See W.

Aitchison, *The Rights of Police Officers* (5th Ed. 2004). This 455 page treatise and other authorities cited herein demonstrate that class-of-one claims are hardly ever brought by police officers. In fact, in Aitchison, there is no treatment of class-of-one claims. However, removing police employment from the reach of equal protection would constitute a giant retreat and expose American police officers to even more arbitrariness at a time when officers critically need fundamental equal protection.

## II. CLASS OF ONE EQUAL PROTECTION PROVIDES CRUCIAL PROTECTIONS TO POLICE OFFICERS IN NON-COLLECTIVE BARGAINING STATES.

The proper and efficient functioning of the American criminal justice system depends largely on the efficiency of the law enforcement profession. Police officers serve as the first responders and front line of defense within America. Since September 11, 2001, homeland security and many other growing problems have added greater stressors and new workplace risks to the law enforcement profession. Budgets are strained; conditions are deteriorating; pressures are intensifying. More than ever before, American police officers need the fundamental protection from workplace arbitrariness prohibited by the Equal Protection Clause.

Historically, police officers have only very rarely brought class-of-one equal protection claims. Many regions of the country with collective bargaining and statutory protections for officers have minimized the need for the occasional class-of-

one claim. Nevertheless, class-of one equal protection must remain as a deterrent to arbitrary abuse of power; it is also especially necessary that the class-of-one principle remain as a cause of action for officers who have no other recourse against arbitrariness.

In the new millennium, complaints against law enforcement officers are increasing. Some complaints often become highly politicized, both within agencies and in the media. Police employers are more prone to react to political pressures from interest groups and others when the easy solution is to just fire the officer. Many of these complaints represent nothing more than an angry suspect who has had an unpleasant encounter with an officer. In many such encounters, police officers have been verbally abused, spit upon, harassed, stalked, assaulted, battered, ambushed, stabbed, shot, run over and sometimes even killed. Police work conditions have been characterized as "scandalous." Bopp & Schultz, *A Short History of American Law Enforcement* 73 (1972). American police officers serve in this unique and sometimes horrifying employment environment. Law enforcement officers are the most challenged, threatened, accused, abused and violated class of persons in America. Thus, their need for equal protection is imperative.

Law enforcement officers must survive not only a highly dangerous workplace but also endless personnel related investigations and complaints. "[A]n officer oftentimes only has a split second to make the critical judgment...." *Ford v. Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988). This Court has long

recognized the unique burden of the police officer who must make a split second decision. E.g., *Scott v. Harris*, 127 S. Ct. 1769 (2007). Once that decision is made, however, the officer must then endure a process of Monday morning quarterbacking that often continues for many years of complaints, investigations, interviews, interrogations, orders, testing, polygraphing, fitness for duty exams, administrative charges, certification investigations, civil suits, depositions, civilian review boards, media scrutiny, certification agency inquiries, disciplinary actions, and grand jury probes. "The policeman's world is spawned of degradation, corruption and insecurity.... he walks alone, like a pedestrian in Hell." William A. Westley, *Violence and the Police* (1970). See *Violent Encounters: A Study of Felonious Assaults On Our Nations' Law Enforcement Officers* (2006; U.S. Department of Justice)("Law enforcement officers, charged with safeguarding the nation's citizens, face potential felonious death and assault daily.").

**The Class Of One Doctrine Improves The Quality of Police Services.**

The laws governing police employment relations profoundly affect both the quality of police services and the daily lives of police officers everywhere. Agencies, officers and the public are all better served by meaningful equal protection for police officers. Equal protection safeguards against government arbitrariness which can deprive an

officer of his or her entire career because a single adverse action often dooms the officer's career.

Similarly, an arbitrary decision deprives the agency of an officer and erodes agency morale. With the tremendous cost of properly training new officers, it makes sound economic sense to afford basic equal protection to officers. Police agencies benefit from a healthy non-arbitrary and non-discriminatory work environment which inspires community confidence and taxpayer support.

Equal protection not only promotes efficiency and professionalism within the police workplace; it also promotes officer trust, confidence and positive morale. This in turn leads to valuable benefits for everyone including enhanced public safety. A positively motivated law enforcement workforce breeds an environment of collegiality, efficiency and esprit de corps.

Without class-of-one equal protection, arbitrary and discriminatory government power goes unchecked. Denying equal protection to law enforcement officers would frustrate the entire system by demoralizing valuable officers and rewarding abusive management officials for their own misconduct.

The class-of-one principle has long been available to protect police officers in America. See, e.g., *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981)(recognizing non-suspect class disparate treatment equal protection claim for police officer); *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76

(2002)(Officer Toomer was singled out for arbitrary disparate treatment by publicly disclosing his personnel file following settlement; class-of-one claim recognized).

The post-*Willowbrook* class-of-one cases have been very sporadic. Class-of-one employment cases have been very rare. *Willowbrook* opened no floodgate of litigation in public employment or otherwise. For example, in the Fourth Circuit, there appear to be only eleven published cases that cite *Willowbrook* and only five appear to address the merits of a class-of-one claim. Only one was a police employment claim. *Kirby v. Elizabeth City,* 388 F.3d 440 (4th Cir. 2005). While other causes of action may occasionally be available, in many states where collective bargaining is outlawed or where there is inadequate statutory protection, class-of-one equal protection is sometimes the only source of residual protection to challenge arbitrariness or disparate treatment.

Arbitrary personnel decisionmaking is especially dangerous in police agencies where officer morale and esprit de corps are essential to maintain close working relationships and to retain an experienced police workforce that can effectively protect public safety. Police officers must be free to conduct investigations and make charging decisions free of improper influence by elected officials and bureaucrats seeking to manipulate the criminal justice process.

Even in large police agencies, political intervention in the officer's work environment occurs

occasionally, thereby corrupting the criminal justice process and often scapegoating the officer involved. For example, in Fayetteville, North Carolina, Officer Jennifer Rodriguez recently had the courage to ticket the wife of a high level prominent military official for a red light violation. This ticket provoked direct political and non-police administrative intervention causing the issued ticket to be "voided." Officer Rodriguez came under attack and was subjected to overt hostility in the workplace, verbal abuse, direct retaliation and other misconduct which ultimately cost Officer Rodriguez her job and her career. See Buxton, *Officer Was Scapegoated In Scandal*, February 2, 2008; http://www.fayobserver.com., and earlier articles; Trautman, *A Study of Law Enforcement* 23 (1990)(observing political influence on police officers); *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000) (jailer fired for political reasons) and other cases cited *infra*. Such political intermeddlings into police investigations are troublesome occupational hazards for police officers in the new millennium.

There have been very few police personnel class-of-one claims in recent years. The doctrine is more likely needed for application in the more occasional rogue police agency, where police management deviates from professional and constitutional disciplinary standards. For example, in North Carolina's largest police agency, the North Carolina Highway Patrol, agency management has imposed arbitrariness and disparate treatment upon some troopers while covering up and condoning

severe and even criminal misconduct of others.[4] Political intermeddling into the lives and work of Troopers has continued for years. See, e.g. *Michael Gahagan v. N.C. Highway Patrol*, 2000 WL 33946065 (W.D.N.C. 2000; and 2000 CVS 19; Madison County Superior Court) (Trooper transferred due to partisan pressure from Democratic Party political operatives).

Arbitrariness and disparate treatment problems have interfered with North Carolina Troopers and precluded them from enjoying the same rights as other Troopers.[5] These and other personnel cases unlawfully disciplining police officers and Troopers have wreaked havoc in North

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4. E.g. *Monty Poarch v. N.C. Highway Patrol*, 03 OSP 2004 (September 17, 2007; ALJ decision; Trooper fired for having an off-duty affair while other troopers who committed a broad range of crimes and other severe misconduct were not punished or punished with trivial discipline; adopted in part). While certain career service state Troopers enjoy limited rights under the State Personnel Act, N.C.G.S. chapter 126, other Troopers and municipal and county police officers only have protection from arbitrariness as provided by the class-of-one doctrine.

5. See *Jerry Brand v. N.C. Highway Patrol*, 2005 WL 1799895 (M.D.N.C. 2005)($63,000 verdict affirmed for retaliatory transfer); *Jerry Brand v. N.C. Highway Patrol*, 352 F. Supp. 2d 606 (M.D.N.C. 2004)(denying summary judgment); *Andreas Dietrich v. N.C. Highway Patrol, 2001 WL 3405588;* 00 OSP 1039; ALJ decision; arbitrary discipline reversed); *Charles Lindquist v. N.C. Highway Patrol*, (98 OSP 0170)(Trooper retaliated against for writing article about Patrol Commander's misconduct; arbitrary discipline reversed); *Edward Royal v. N.C. Highway Patrol*, (06-756; N.C. Ct. App.; July 3, 2007)(arbitrariness and disparate treatment of Trooper; arbitrary discipline reversed); *Allan Williams v. N.C. Highway Patrol*, (98 CV 1217; Columbus Superior Court; Trooper retaliated against by transfer and physical battery because Trooper reported supervisor for misconduct; jury verdict for Trooper); *Terrence Hardy v. N.C. Highway Patrol*, 2003 WL 21638179, 02 OSP 1670.

Carolina for many years. The availability of class-of-one claims is a powerful deterrent to bureaucrats contemplating arbitrary decisions.

America's law enforcement officers work in peril. The danger of death or serious injury to officers is compounded by the risk of arbitrary employment treatment, which represents unique stressors for American police officers. The Ninth Circuit's decision to eliminate basic equal protection for police officers represents an extremist view of our Constitution which, if adopted by this Court, would leave officers at the mercy of governmental abuse while also reducing police agency efficiency and public safety. The Equal Protection Clause must remain as a meaningful tool for protection of the American law enforcement profession.

## III. POLICE OFFICERS ARE ENTITLED TO THE SAME EQUAL PROTECTION AS AFFORDED TO OTHER CLASSES OF CITIZENS.

The Ninth Circuit's decision effectively renders public employees and police officers second class citizens by holding that "the class-of-one theory of equal protection is not applicable to decisions made by public employers." 478 F.3d at 993. There is no legitimate basis to carve out such a special niche eliminating equal protection for police officers.

As government has grown, so has the scope of power enjoyed by government employers.[6] Americans from all walks of life must rely on the Constitution for protection from arbitrary and oppressive government power.[7] Contemporary law enforcement bureaucracies afford vast opportunities for abusive tactics that are unconstitutionally arbitrary.[8] Cases adjudicating the rights of law enforcement officers demonstrate the necessity of consistent legal safeguards.[9] Patrol commanders, sheriffs, police chiefs, and other local government officials are more prone to influence by direct political and other improper pressures, and therefore

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6. Millions of individuals are employed by more than eighty two thousand governmental units at local, state, and federal levels. As of 1991, more than 18 million persons were employed by local, state or the federal government. See *Waters v. Churchill*, 511 U.S. 661, 697 n.3 (1994)(Stevens, J. and Blackmun, J., dissenting)(citing the 1991 figures from the U.S. Department of Commerce Statistical Abstract of the United States, Table No. 500, page 318 (113 ed. 1993). The 2005 data indicate that there were 18,644,112 government employees that year. http://ftp2census/gov/govs/apes/05fedfun.pdf.

7. See Senator Sam J. Ervin, Jr., *Preserving The Constitution* 165, 213 - 214 (1984); Boward, *Lost Rights: The Destruction of American Liberty* 1-6, 49 - 51 (1995). In North Carolina, a local government singled out a woman whose Elvis Presley style dancing offended some people and the town banished her from dances at a town facility. See *Willis v. Town of Marshall*, 426 F.3d 251 (4th Cir. 2005), where the Fourth Circuit applied the class-of-one doctrine and denied summary judgment to the Town because it had treated Ms. Willis arbitrarily and subjected her to disparate treatment.

8. See *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)(cataloging cases of government retaliation in different contexts).

9. See Levinson, *Silencing Government Employee Whistleblowers In The Name of "Efficiency"*, 23 Ohio Northern U. L. Rev. 17 (1996)(cataloging numerous cases demonstrating retaliation against police officers).

more likely to act with retaliatory, discriminatory or other improper motives.[10]

Police officers have been subject to the most sweeping personal attacks, including risky invasions into their personal lives.[11] Police officers sometimes end up having to fight to protect their careers because a significant disciplinary finding often dooms an officer's entire career.[12]

This Court has long held that the Equal Protection Clause applies to a wide range of public employment related decisions. See *Washington v. Davis*, 426 U.S. 229 (1976); see also *Nevada Dept. of Human Resoures v. Hibbs*, 538 U.S. 721, 728-29 (2003). "Equal protection demands at a minimum that ... [government] must apply its laws in a rational and nonarbitrary way." *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982). "Equal protection does require at the least, however, that the state act sensibly and in good faith." *Brandon v. Dist. of Col.*,

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[10] See, e.g. *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000)(jailer fired for lack of political loyalty); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999)(officer suspended and disciplined for teaching a concealed carry firearms safety course where the police chief was a political opponent of the concealed carry law), and cases cited herein.

[11] See *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)(examining privacy interests of police officers in a challenge whereby the home addresses of officers were disclosed). Accord *Fraternal Order of Police v. Philadelphia*, 812 F.2d 105 (3rd Cir. 1987).

[12] This Court has recognized the very narrow liberty interest claim, which provides limited protection from certain types of publicized stigmatizing allegations. See *Codd v. Velger*, 429 U.S. 624 (1977)(New York City police officer suffered stigmatizing effects of termination by inclusion of information within his personnel file).

734 F.2d 56, 56 (D.C. Cir. 1984), quoting *Logan v. Zimmerman Brush*, 455 U.S. 422, 439 (1981).

The Ninth Circuit's decision excluding class-of-one cases from public employment is wholly unprecedented. There is simply no logical basis to categorically exclude equal protection claims from public employment. Ironically, the Ninth Circuit has carved out a particular class for complete exclusion from the Equal Protection Clause. This holding sharply conflicts with more than a century of equal protection law, a cornerstone of American jurisprudence and history. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court enunciated a fundamental principle:

> When we consider the nature and the theory of our institutions of government ... they do not leave room for the play and action of *purely personal and arbitrary power* ... The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails...118 U.S. at 369 (emphasis added).

*Yick Wo* launched more than a century of evolving equal protection jurisprudence which has become settled doctrine. E.g., *McFarland v. American Sugar*, 241 U.S. 79, 86-87 (1916)(statute that bristled with severities that touch the plaintiff alone was arbitrary and a violation of equal protection);

*Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944); *Oyler v. Boyles*, 368 U.S. 448 (1962); *Bankers Life v. Crenshaw*, 486 U.S. 71, 83 (1988). Cf. *Missouri v. Lewis*, 101 U.S. 22, 28, 11 Otto 22 (1879)(Equal protection "inure[s] to the common benefit of all."). [13] *Willowbrook* was but the latest decision by this Court to reaffirm this settled equal protection doctrine:

> Our cases have recognized successful equal protection claims brought by a 'class of one' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.
>
> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person...against intentional and arbitrary discrimination...." 528 U.S. at 564.

In *Willowbrook,* this Court held the allegations by the plaintiff that the Village's conduct was "irrational and wholly arbitrary" were sufficient to state a "traditional" equal protection claim "quite apart from the Village's subjective motivation." This Court in Willowbrook *did not* require a showing of malice or animus. 528 U.S. at 565 (class-of-one claim based on "irrational and wholly arbitrary" government action). See Geha, *With Malice Toward*

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[13] Selective enforcement is a recognized subset of equal protection. See 16B Am Jur 2d Constitutional Law, section 889, *What Constitutes Selective Enforcement or Discriminatory Administration* (1998).

*One: Malice And The Substantive Law In "Class Of One" Equal Protection Claims In The Wake Of Village Of Willowbrook v. Olech*, 54 Me. L. Rev. 329 (2002). Although malice may be one means to demonstrate arbitrariness, the threshold for constitutional protection has never required malice. Arbitrariness may be otherwise shown from either vindictiveness, retaliation, bad faith, selective enforcement or disparate treatment.

In *Indiana Teachers v. School Committee,* 101 F.3d 1179, 1181 (7th Cir. 1996), the Seventh Circuit explained:

> The equal protection clause does not speak of classes. A class, moreover, can consist of a single member... The equal protection clause protects class-of-one plaintiffs victimized by the wholly arbitrary act. The equal protection clause can be brought into play as a protection against allowing the government to single out a hapless individual, firm or other entity for unfavorable treatment.

**Some Of Willowbrook's Early Antecedents Established The Floor Of Equal Protection.**

Since 1944, this Court has recognized that selective enforcement may support an equal protection claim even where there is no suspect class. In *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944), the Court recognized that an equal protection

violation may be premised upon deliberate selective enforcement based upon "unjustifiable standards." In *Oyler v. Boyles*, 368 U.S. 448 (1962), the Court held that equal protection prohibits discrimination on grounds of race, religion or "other arbitrary classification." The American law enforcement profession has experienced both "unjustifiable standards" and "arbitrary classifications." "The Equal Protection Clause prohibits 'arbitrary and irrational discrimination' even if no suspect class or fundamental right is implicated." *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999), quoting *Bankers Life v. Crenshaw*, 486 U.S. 71, 83 (1988). See Cheval, *By The Way -The Equal Protection Clause Has Always Protected A "Class-Of-One:" An Examination of Village of Willowbrook v. Olech*, 104 W. Va. L. Rev. 593 (2002)(reviewing history of non-suspect class equal protection).

In *Esmail v. Macrane*, 53 F.3d 176, 179-180 (7th Cir. 1995), perhaps the seminal modern case reviewing the "vindictive action" line of equal protection decisions, the Seventh Circuit considered a recurring problem of arbitrariness: governmental vindictiveness or revenge. Vindictiveness has long been recognized by the Court as an improper motive. E.g., *U.S. v. Goodwin*, 457 U.S. 368, 372 (1982). E*smail* observed that "[t]he charge here is that a powerful public official picked on a person out of sheer vindictiveness; and we must consider what standing such a charge has in the law of equal protection." 53 F.3d at 178. *Esmail* held that selective enforcement premised upon vindictiveness violates equal protection.

As *Esmail* observed, this Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) explained that some objectives of government action simply are illegitimate. A personal vendetta, selective enforcement or bad faith intent to injure are clearly not legitimate governmental objectives. In *Esmail*, the Seventh Circuit reasoned that:

> If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court... [N]either in terms nor in interpretation is the [equal protection] clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against government action... *Esmail,* 53 F.3d at 179-180.

**Early Circuit Court Foundation Further Established Non-Suspect Class Equal Protection.**

Foundation for the class-of-one strand of equal protection jurisprudence is derived from *Snowden*, *Oyler*, other cases of this Court, and the leading Second Circuit cases of *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), and their progeny. *Burt* has been characterized as the "grandfather" of the class-of-one cases. See Geha, *With Malice*

*Toward One: Malice And The Substantive Law In "Class Of One" Equal Protection Claims In The Wake Of Village Of Willowbrook v. Olech*, 54 Me. L. Rev. 329, 338-39 (2002).

In *Burt*, Judge Learned Hand's opinion concluded that an architect stated a valid class-of-one equal protection claim where city officials "deliberately misinterpreted and abused their statutory power in order to deny his applications." The architect alleged that city officials selected him for oppressive measures, unconditionally approving applications of other architects. The architect alleged that he was "singled out for unlawful oppression" and that he was a victim of "purposeful discrimination." The Second Circuit concluded that deliberate misinterpretation of a statute against a plaintiff for the purpose of singling him out states a valid equal protection claim. Cf. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994)(holding that the crux of an equal protection claim is the "singling him out alone for that misinterpretation"). Judge Hand's analysis in *Burt* has been characterized as "particularly persuasive" by other courts. See *Smith v. Eastern New Mexico*, 72 F.3d 138, 1995 WL 749712, at 7 (10th Cir. 1995).

In *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980), the Second Circuit held that a "selective treatment" claim may be premised upon:

> intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

*LeClair* observed that equal protection may be violated when "unequal administration of a state statute shows intentional or purposeful discrimination." *LeClair* has served as settled precedent relied upon by the law enforcement profession for nearly thirty years.

In *Ciechon v. City of Chicago,* 686 F.2d 511, 522 (7th Cir. 1982), the court reasoned that "[e]qual protection demands at a minimum that ... [government] must apply its laws in a rational and nonarbitrary way."[14] There, the plaintiff, a paramedic, was fired as a result of alleged mistreatment of a patient on an ambulance run. However, Ciechon and her partner paramedic, Ritt, were equally responsible for the welfare of a patient. However, Ciechon was fired and Ritt was not punished at all. The Court's decision in *Ciechon* was grounded upon the fact that the "defendants purposely and invidiously chose one of two similarly situated employees for undeserved punishment and misused otherwise legitimate disciplinary procedures..." 686 F.2d at 517.

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[14] Arbitrary and capricious is defined as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." BLACKS LAW DICTIONARY 96 (5th ed. 1979). For additional definitions of arbitrary and capricious, see *United States v. Carmack*, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned . . . ." *Id. See also Bruno's, Inc. v. United States*, 624 F.2d 592, 594 (5th Cir. 1980)(arbitrary and capricious means either "unwarranted in law" or "without justification in fact").

These and other cases have long provided equal protection for police officers victimized by arbitrary adverse employment actions. There is no justification for revolutionary change in this crucial constitutional law protecting police officers.

## CONCLUSION

WHEREFORE, this Court should reverse the Ninth Circuit decision below and adopt a practical standard of proof forbidding governmental arbitrariness in employment grounded in either vindictiveness, disparate treatment, selective enforcement or bad faith. Too many law enforcement officers are subjected to workplace arbitrariness and disparate treatment to allow the complete elimination of this time honored doctrine. Law enforcement officers, like all other persons under the jurisdiction of our Constitution, should continue to enjoy the class-of-one strand of equal protection.

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# AMICUS CURIAE BRIEF

No. 07-474

IN THE

# Supreme Court of the United States

ANUP ENGQUIST,

*Petitioner*,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND GOVERNMENT FINANCE OFFICERS ASSOCIATION, JOINED BY THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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## QUESTION PRESENTED

Whether the equal protection analysis of *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), applies in public employment.

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## INTEREST OF THE *AMICI CURIAE*

*Amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in fair and effective management of public-sector labor relations and in protecting "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). *Amici* accordingly submit this brief to assist the Court in its resolution of this case.

## SUMMARY OF ARGUMENT

1. This Court has long recognized that public employees do not enjoy the full range of constitutional protections afforded to them as ordinary citizens due to "the practical realities involved in the administration of a government office." *Connick v. Myers*, 461 U.S. 138, 154 (1983). This is particularly true where, as here, the asserted interest is at the periphery of the core concerns of the Constitution.

The central purpose of the Equal Protection Clause is "the abolition of all caste-based and invidious class-based legislation." *Plyler v. Doe*, 457 U.S. 202, 213 (1982). The cases petitioner cites to support her assertion that the Clause has historically been understood to protect "persons, not just classes" involved legislative classes, not discrimination against

[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

individuals as such. These cases demonstrate that the primary harm against which the Clause is directed is discrimination by virtue of group membership.

Because petitioner's asserted Equal Protection interest is removed from the historic purpose and scope of the Clause, expanding the class-of-one doctrine to encompass a vast array of workplace grievances unrelated to group discrimination would risk trivializing the Constitution and defy this Court's teaching that the Constitution is not a font of tort law. The Court's precedents simply do not support the notion, central to petitioner's theory, that personal dislike of an employee by a supervisor is as repugnant to the Equal Protection Clause as discrimination based on group characteristics such as race, gender, or sexual orientation.

2. State and local governments, which are accountable to the citizenry, have long successfully managed public-sector labor relations through a variety of mechanisms, including collective bargaining, civil service regulations and adjudicatory tribunals, and legal remedies created by statute or common law. This preexisting employment-relations landscape would be severely disrupted were this Court to adopt petitioner's Equal Protection theory. Class-of-one claims would disrupt the workplace and impede governance as longstanding state employment law and remedies would be displaced by federal constitutional law applied in federal courts.

Such disruption is unwise and unwarranted for several reasons. First, in many instances, including this case, the operative collective bargaining agreement will protect members of the bargaining unit from termination other than "for cause." *See* J.A. 38

(dist. ct. op.). Labor agreements also contain detailed frameworks for how layoffs are to be implemented and create bumping rights for employees such as petitioner. *See id.* at 38–39 (citing petitioner's Collective Bargaining Agreement, arts. 21, 22, 70).

Rights created by collective bargaining agreements, such as the right to be terminated only for cause, are, in turn, subject to administration and adjudication by state labor relations boards, such as Oregon's Employment Relations Board. According to petitioner's *amici*, "[t]he overwhelming majority of states have similarly adopted merit systems for large portions of their workforces. Indeed, at least twelve states mandate merit systems in their constitutions. . . . [O]ne of the 'central principles' of the merit system is 'absence of arbitrary removals.'" Br. *Am. Cur.* NEA, AFL-CIO & AAUP 17 & n.4 (collecting state constitutional citations).

In addition to such collectively bargained and state law rights, every State recognizes a variety of tort claims, including intentional interference with contractual relations and wrongful discharge, which protect the same right as petitioner's class-of-one claim: the right to be free from arbitrary treatment in the workplace. Public employees can thus assert, as petitioner successfully did, a state-law contract-interference claim against supervisors who act outside the scope their employment duties. *See Haddle v. Garrison*, 525 U.S. 121, 126–27 (1998). Moreover, public employees can file state-law wrongful discharge actions if they are terminated in contravention of public policy.

Finally, petitioner's Equal Protection theory would have severely disruptive consequences if

adopted by this Court. Public employees would potentially have a federal constitutional claim arising from any adverse employment decision that the employee believes was animus-based or otherwise arbitrary, but that the public employer believes was for cause and thus had a rational basis. Petitioner and her *amici* acknowledge that few if any such Equal Protection claims can be resolved short of trial. *See, e.g.*, Pet. Br. 42; Br. *Am. Cur.* NEA, AFL-CIO & AAUP 25. To make matters worse, petitioner admits that almost none of these rational-basis class-of-one claims are meritorious: "In practice, it has been difficult for plaintiffs to show that the government has failed to meet [the rational basis] standard, particularly in the context of public employment." Pet. Br. 41; *see also id.* at 35 ("[O]nly a handful of [class-of-one] claims have succeeded.").

Petitioner's Equal Protection theory thus leads to the worst of all possible worlds: the creation of a vast universe of potential public-employee plaintiffs who can assert fact-intensive constitutional claims that will almost invariably result in trials that they will lose, at great monetary and emotional cost to themselves, to the governmental defendants, and to the citizenry, which depends upon the effective delivery of government services. There is no reason to believe that this is what the drafters of the Fourteenth Amendment intended.

## ARGUMENT

### I. THE EQUAL PROTECTION ANALYSIS OF *OLECH* SHOULD NOT APPLY IN PUBLIC EMPLOYMENT.

#### A. A Class-of-One Claim Is Outside the Traditional Concerns of the Equal Protection Clause.

As respondents demonstrate (Br. 30–37), this Court has long recognized that public employees do not enjoy the full range of constitutional protections afforded to them as ordinary citizens. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1958 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."). Accordingly, while the Court has ensured that public employees are not deprived of their rights under the Constitution, it has readily curtailed federal judicial review where an employee's interest interferes with "the practical realities involved in the administration of a government office"—particularly where the asserted interest lies outside the core concerns of traditional constitutional protection. *Connick v. Myers*, 461 U.S. 138, 147, 154 (1983).

In *Connick*, for example, this Court held that the First Amendment was not violated where an assistant district attorney was fired for circulating a questionnaire regarding office policies. *Id.* at 141. Recognizing that "the First Amendment's primary aim is the full protection of speech upon issues of public concern," the Court concluded that the plaintiff's "limited First Amendment interest" lay at the periphery of this core function: "[T]he questionnaire touched upon matters of public concern only in a

most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 154.

Similarly, petitioner's asserted constitutional interest is removed from the traditional purview of the Fourteenth Amendment's Equal Protection Clause.[2] This Court has recognized that the central purpose of the Equal Protection Clause is "the abolition of all *caste-based* and invidious *class-based* legislation."[3] *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (emphasis added). Indeed, this Court's Equal Protection jurisprudence has been almost entirely concerned with discriminatory class-based legislation and enforce-

[2] Though *Olech* did not expound on the precise contours of a class of one, *amici* submit that a class-of-one claim involves discrimination against an individual solely because of personal animosity, and is not tied to the exercise of a fundamental right or membership in any class. *Accord* Br. Am. Cur. Lambda Legal Defense & Educ. Fund, ACLU, *et al.* 18 ("In a true 'class of one' claim, the plaintiff alleges that he or she has been discriminated against as an individual, not because of any group characteristic shared with others."); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210 (10th Cir. 2004). As such, this case does not implicate rational basis review of workplace discrimination against classes, such as classes based on sexual orientation, which are not protected by Title VII and other anti-discrimination legislation. There is consequently no basis for the concern of petitioner's *amici* that declining to recognize petitioner's class-of-one claim will lead to the erosion of judicial review for class-based discrimination.

[3] The particular evil that spurred the adoption of the Fourteenth Amendment was "discrimination because of race or color." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880); *see also Washington v. Davis*, 426 U.S. 226, 239 (1976); *Palmer v. Thompson*, 403 U.S. 217, 220 (1971); *Slaughter-House Cases*, 16 U.S. (Wall.) 36, 71–72 (1873).

ment—that is, government action adverse to more than one person.

To be sure, the Equal Protection Clause establishes a general right to be treated the same as all persons similarly situated.[4] *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Yet every case cited by petitioner in support of the proposition that the Equal Protection Clause has historically been understood to protect "persons, not just classes" involved a legislative class, not discrimination against an individual as such. *See* Pet. Br. 14–17. This fact reflects the political reality that legislation is very rarely directed against an individual by virtue of personal identity or some idiosyncratic personal characteristic. *Cf. McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916). Rather, as this Court's cases demonstrate, the primary harm against which the Equal Protection Clause is directed is discrimination by virtue of group membership. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Plyler*, 457 U.S. at 202; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see generally United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

The danger that the Constitution will be offended when a single person is discriminated against without regard to any shared group characteristic is far more limited. It arises from the paradigmatic situa-

[4] At this level of generality, this right is no different from the right to be free from unreasonable search and seizure or the right to free speech, in that it may also be limited in the workplace. *See O'Connor v. Ortega*, 480 U.S. 709 (1987); *Connick*, 461 U.S. at 138.

tion identified by this Court in *Olech*, in which "a public official, with no conceivable basis for his action other than spite or some other improper motive . . . comes down hard on a hapless private citizen." *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005); *cf. Allegheny Pittsburgh Coal v. County Comm'n*, 488 U.S. 336, 345–46 (1989). But as Judge Posner explains:

> As one moves away from the paradigmatic case, the sense of a wrong of constitutional dignity, and of a need for a federal remedy, attenuates. And when as in this case the unequal treatment arises out of the employment relation, the case for federal judicial intervention in the name of equal protection is especially thin.

*Lauth*, 424 F.3d at 633. Accordingly, a consideration of the interests at stake in this case leads to the conclusion that petitioner's Equal Protection interest is too attenuated from the purposes of the Fourteenth Amendment to state a constitutional claim in the workplace.

Because petitioner's asserted constitutional interest is removed from the historic purpose and scope of the Equal Protection Clause, expanding the class-of-one doctrine to encompass workplace grievances unrelated to group discrimination would risk trivializing the principles that have historically animated the Clause.[5] Elevating the expression of personal

---

[5] *See Daniels v. Williams*, 474 U.S. 327, 332 (1986) ("To hold that injury caused by [negligence] is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law."); *Connick*, 461 U.S. at 154 ("[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safe-

animosity in the workplace—conduct that has been traditionally policed by tort remedies—to constitutional status would defy this Court's admonition that the Constitution is not to be made a font of tort law. *See Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also* discussion pp. 18–20 *infra*. Moreover, under petitioner's theory, any public employee who could not provide evidence that a group-based trait was the source of discriminatory animus could nonetheless plead and prove a class-of-one claim by a showing of personal dislike, or, because such animus is not required by *Olech*, simply by challenging an employment decision as irrational. But this Court's cases do not support the notion that *personal dislike* is as repugnant to the Equal Protection Clause as discrimination based on group characteristics such as race, gender, or sexual orientation.

Conversely, declining to recognize the class-of-one claim in the workplace does not negate a public employee's Equal Protection rights. Contrary to petitioner's assertion that the Ninth Circuit "set the Constitution aside altogether," Pet. Br. 24, 34, the core protections afforded by the Equal Protection Clause remain intact for every public employee.[6] Federal employees may challenge workplace discrimination on the basis of protected class through Title VII's comprehensive remedial scheme. *See Brown v.*

guarding of a public employee's right, as a citizen . . . were confused with the attempt to constitutionalize the employee grievance . . . .").

[6] Petitioner is thus mistaken in stating that the Ninth Circuit held that the Equal Protection Clause applies to "some public employees, some of the time." Pet. Br. 11. The unavailability of the class-of-one claim does not alter the protections of the Clause for *all* employees who assert claims based on class membership.

*Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976). In addition, state and local government employees may assert their Equal Protection rights under 42 U.S.C. § 1981, 42 U.S.C. § 1983, and other applicable federal statutes.[7] The unavailability of a class-of-one claim does not mean that a public employee is without federal Equal Protection rights; it means only that an employee cannot assert the limited constitutional interest recognized in *Olech*.

### B. In the Workplace, Equal Protection Rights Should Be Limited To Redressing Group-Based Discrimination.

In other contexts, this Court has signaled its reluctance to extend Equal Protection rights so far that they interfere with the essential operations of state and local governments. For example, in traditional law enforcement, "the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also United States v. Armstrong*, 517 U.S. 456 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that

[7] Legislation extends to vulnerable groups that are not suspect classes under the Equal Protection Clause. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (prohibiting discrimination because of disability); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (prohibiting discrimination because of age); National Labor Relations Act, 29 U.S.C. § 158 (prohibiting discrimination against employees for exercising rights under the Act); *see also* Or. Rev. Stat. § 659A.003 (2007) (prohibiting discrimination against employees because of, *inter alia*, sexual orientation and marital status).

Before the district court, petitioner asserted claims under Title VII and § 1981 alleging discrimination on the basis of sex, ethnicity, and race. Pet. App. 17. The jury rejected these claims. *Id.* at 18.

the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion.").

In *Wayte*, the Court explained that "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review" because it entails determinations that are "not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607. Though the Court noted that prosecutorial discretion is subject to the Fourteenth Amendment and other constitutional constraints, it understood a showing of "discriminatory purpose" to imply that the prosecutor "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an *identifiable group*." *Id.* at 610 (quoting *Massachussetts v. Feeney*, 442 U.S. 256 (1979) (emphasis added).

The need to limit Equal Protection rights by reference to identifiable groups is likewise demonstrated by this Court's interpretation of 42 U.S.C. § 1985(3), which prohibits conspiracies "for the purpose of depriving . . . *any person* or class of persons of the equal protection of the laws." (emphasis added). Notwithstanding the textual grant of a personal right, the Court held that discriminatory intent "means that there must be some racial, or perhaps *otherwise class-based*, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis added). By limiting the reach of the statute to class-based discrimination, the Court explained that it was avoiding the "constitutional shoals that would lie in

the path of interpreting § 1985(3) as a general federal tort law." *Id.*

Both *Wayte* and *Griffin* reflect this Court's unwillingness to define discriminatory intent by the discrimination itself. *See United Bhd. of Carpenters & Joiners of America v. Scott*, 463 U.S. 825, 850 (1983) (for purposes of § 1985(3), "the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action"); *cf. Futernick v. Sumpter Township*, 78 F.3d 1051, 1059 (6th Cir. 1996) (Boggs, J.) ("From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as *random* as the roll of a dice.").

A similar scope of review is appropriate in the context of public employment, where the limited right of an individual to be free from arbitrary discrimination because of personal identity must give way by necessity to the government's interest in managing its internal affairs. This conclusion follows inexorably from the "common-sense realization that government offices could not function if every employment decision became a constitutional matter," *Connick*, 461 U.S. at 143, and the recognition that it is not the place of the federal judiciary to review every employment decision as a constitutional matter. *Bishop v. Wood*, 426 U.S. 341, 349–50 (1976) (declining to recognize a claim under the Due Process Clause that would result in the "review [of] the multitude of personnel decisions that are made daily by public agencies").

Recently, this Court reaffirmed these precepts in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006). In holding that the First Amendment is not violated when public employees are disciplined for

speech made pursuant to their official duties, the Court recognized that "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers," and such "displacement of managerial discretion by judicial supervision finds no support in our precedents." *Id.* at 1961.

If petitioner's constitutional theory is adopted by the Court, the extent of federal-court intrusion into government operations would go well beyond *Garcetti*, because a class-of-one claim could theoretically arise out of any adverse employment decision—for example, involuntary transfers, reassignments, and promotion and pay decisions—not just disciplinary action related to employee speech. And like prosecutorial decisions, personnel decisions are particularly ill-suited for judicial review. As petitioner recognizes, there is a "wide range of legitimate bases for discriminatory treatment that are unique to the employment relationship." Pet. Br. 49. These "legitimate bases" include employers' subjective evaluations of employees' personalities and interpersonal abilities. *See id.*

A class-of-one claim would thus interject the federal courts into workplace disputes that require them to distinguish legitimate from illegitimate bases for personal dislike, and further, if the dislike is irrational, to discern whether dislike was the motivating factor in an otherwise legitimate employment action. *See* Resp. Br. 38–39 ("[T]here is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible relevant factors.") (citation

omitted). Though traditional rational basis review purports to be minimally searching, this open-ended inspection into subjective motivation goes beyond the mixed-motive analysis that courts use in cases involving race and gender. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *cf. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In public employment, "[w]e must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require judicial review for every such error." *Bishop*, 426 U.S. at 350. Thus, as it has done for other constitutional rights in the workplace, this Court should foreclose judicial review for an interest that does not implicate the central purposes of the Equal Protection Clause.

## II. PETITIONER'S CLASS-OF-ONE THEORY WOULD HAVE DISRUPTIVE CONSEQUENCES THAT ARE UNNECESSARY BECAUSE OF EXISTING STATE REMEDIES.

### A. State Employee Grievances Should Be Resolved Through State-Created Mechanisms, Not as Federal Constitutional Claims.

The Fourteenth Amendment was never intended to be "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Yet extending *Olech* into the realm of public sector labor relations threatens to turn the Equal Protection Clause into a font of employment law for every

adverse employment decision where an employee can allege that differential treatment lacks a rational basis.[8]

Since long before this Court first recognized the class-of-one claim, state and local governments—which, unlike the federal courts, are accountable to the citizenry—have successfully managed public sector labor relations through a variety of mechanisms. These include collective bargaining, civil service regulations and adjudicatory tribunals, and legal remedies created by statute or common law.

This employment-relations landscape, which has evolved over many decades, would be severely disrupted if this Court were to adopt petitioner's Equal Protection class-of-one theory. Not only would the threat of federal review interfere with existing state and local government labor relations, disrupt management, and impede governance, but state employment law would be displaced by federal constitutional law.

Under petitioner's theory, employers would be prohibited from taking any adverse employment action unless they were prepared to establish the reasons for their action at trial. Moreover,

> imposing a norm of equal treatment changes employment at will, or . . . probationary em-

[8] This Court has recognized the role of the States in regulating public employment in circumstances that are not the proper subject of federal court review. *See, e.g., Garcetti*, 547 S. Ct. at 1962 (citing the "powerful network of legislative enactments—such as whistle-blower protection laws and labor codes" in rejecting a claim of First Amendment retaliation); *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) (observing that "[p]etitioner's claim is analogous to a fairly typical state-law tort claim" in rejecting a due process violation).

> ployment, into something very close to tenured employment because it is so easy to invent a case of unequal treatment by a supervisor. The principal effect of "class of one" suits by public employees is . . . to undermine discipline in public agencies.

*Lauth*, 424 F.3d at 633 (Posner, J.).[9]

The disruption that would result is, as the Ninth Circuit recognized, unwise and unwarranted for several reasons. First, "[t]he overwhelming majority of state have . . . adopted comprehensive merit systems for large portions of their workforces. . . . Indeed, at least twelve states mandate merit systems in their constitutions." Br. *Am. Cur.* NEA, AFL-CIO & AAUP 17 (collecting state constitutional provisions). As petitioner's *amici* explain, "one of the 'central principles' of the merit system is 'absence of arbitrary removals.'" *Id.* The operative collective bargaining agreement in this case likewise protected petitioner from loss of her job other than "for cause." *See* J.A. 38 ("The Collective Bargaining Agreement appears to provide that plaintiff could be terminated only for cause."); *id.* ("Plaintiff received notice of her

[9] A similar concern was expressed in *Bush v. Lucas*, 462 U.S. 367, 389 (1983), in which the Court declined to establish a damages remedy for a violation of the First Amendment: "if management personnel face the added risk of personal liability . . . they would be deterred from imposing discipline in future cases." Though the question in *Lucas* was whether the Court could issue a remedy in the absence of federal legislation—not whether a constitutional right had been violated—the Court observed that federal employees are "protected by an elaborate, comprehensive scheme . . . forbidding arbitrary action by supervisors" that "appl[ies] to a multitude of personnel decisions that are made daily by federal agencies." *Id.* at 385.

termination and the stated reasons . . . were due to economic downsizing.").

The agreement also contained a detailed framework (Article 70), for how layoffs were to be carried out, and numerous protections and bumping rights for employees subject to layoff. As the district court explained,

> The Collective Bargaining Agreement outlines the process due in the case of a layoff, and the process for filing grievances and seeking arbitration. . . . The agreement provides that an employee shall be notified of her contractual bumping rights and options and notify the employer within five calendar days of the option she chooses.

*Id.* at 38–39 (citing Collective Bargaining Agreement, arts. 21, 22, 70). Petitioner "declined to move to a position in a lower job classification," Pet. Br. 6, and "chose to bump other employees within her classification." J.A. 39. However, once this attempt failed, instead of challenging her dismissal or her inability to bump to a new position under the agreement, petitioner filed this lawsuit in federal court.

Had petitioner's union challenged her dismissal under the agreement, her claim would have been adjudicated by a state system specially designed to mediate workplace disputes.[10] Oregon's Employment

[10] Similar employment tribunals exist in other state and local jurisdictions. *See, e.g.*, Fla. Stat. § 447.201 (2007) (Florida Public Employment Relations Commission); Haw. Rev. Stat. §§ 89-5, 377 (2007) (Hawaii Labor Relations Board); 5 Ill. Comp. Stat. 315/5 (2007) (Illinois Labor Relations Board); Mich. Comp. Laws § 423.3 (2007) (Michigan Employment Relations Commission); Mont. Code Ann. § 39-31-101 (2007) (Montana Labor Standards Bureau); N.Y. Civ. Serv. Law § 200 (2007) (New

Relations Board is a quasi-judicial body which administers collective bargaining agreements for public employees. *See* Or. Rev. Stat. § 243.650 (Public Employee Collective Bargaining Act); Or. Rev. Stat. § 240.005 (State Personnel Relations Law). The Board is designed to "promote stability in the workplace and to reduce workplace disputes and the accompanying costs and disruption of services to the public." Mission Statement, Employment Relations Board, http://www.oregon.gov/ERB/MissionStmt.shtml (last visited Mar. 25, 2008). In particular, "[r]esolution of workplace disputes insures the public that it will continue to receive public services without impairment or interruption; . . . and it is faster, more efficient, and less expensive than resolving these disputes through court proceedings." *Id.* Board orders are subject to judicial review. *See* Or. Rev. Stat. §§ 240.563, 183.480.

Finally, because the class-of-one claim posited by petitioner would encompass all workplace grievances, however minor, it sweeps much too broadly. By contrast, every State recognizes a variety of carefully circumscribed tort claims, including intentional interference with contractual relations and wrongful discharge, which protect the same right as a class-of-one claim: that is, the right to be free from arbitrary treatment in the workplace.

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York Public Employment Relations Board); Cal. Gov't Code §§ 3540, 3541.5 (2006) (California Public Employment Relations Board); Philadelphia, Pa., Code § 3-804 (2007); Cincinnati, Oh., Mun. Code art. 5 § 1 (2001) (Cincinnati Civil Service Commission); San Francisco, Cal., Ordinances § 16.203 (1994) (Employee Relations Division). *See also Lauth*, 424 F.3d at 632 ("Illinois labor law . . . governs [municipal] labor relations.") (citing Illinois Public Labor Relations Act, 5 Ill. Comp. Stat. 315/1-27).

Thus, both at-will and tenured employees can assert a contract-interference claim, as petitioner successfully did, against supervisors who act outside the scope of their employment duties. *See Haddle v. Garrison*, 525 U.S. 121, 126–27 (1998) (noting that the harm of third-party interference applies to at-will employment and "has long been a compensable injury under tort law . . . ."); J.A. 45–46 (describing Oregon law). Moreover, an employee can assert a claim for wrongful discharge if he or she is discharged in contravention of public policy.[11]

This Court has repeatedly instructed that the Fourteenth Amendment "does not purport to supplant traditional tort law" and should not "be interpreted to impose federal duties that are analogous . . . ." *Collins*, 503 U.S. at 128. Yet the duty that a class-of-one claim would impose on employers overlaps with duties that are already imposed and policed through state-created mechanisms, including but not limited to tort law.[12] In *Davis*, for example,

[11] *See, e.g., Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (employee discharged for serving on a jury); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (employee discharged for refusing to participate in an employer's illegal practices); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984) (employee discharged for rejecting the sexual advances of supervisors); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985) (employee discharged for refusing to join games involving indecent exposure).

Some States also allow employees to claim wrongful discharge for terminations in bad faith or without just cause. *See, e.g., Stark v. Circle K. Corp.*, 751 P.2d 162 (Mont. 1988). Oregon does not recognize this claim. *See Sheets v. Knight*, 779 P.2d 1000, 1007-08 (Or. 1989).

[12] The escalation of analogous state tort claims is instructive. *See* James N. Dertouzos & Lynn A. Karoly, RAND Institute for

this Court noted that "if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim of defamation under state law." 424 U.S. at 698. Similarly, if the same allegations had been made against a private employer in this case, petitioner would have only what she in fact won: a classic claim of contractual interference. This Court should reject petitioner's invitation to go further and constitutionalize not only tort claims but run-of-the-mill employee grievances.

### B. Adoption of Petitioner's Equal Protection Theory Would Have Disruptive Consequences.

Notwithstanding petitioner's argument to the contrary, Pet. Br. 34–56, her Equal Protection theory would have severely disruptive consequences if adopted by this Court and applied in public employ-

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Civil Justice, Labor-Market Responses to Employer Liability 35 (1992), *available at* http://www.rand.org/pubs/reports/2007/R3989.pdf (number of wrongful-termination cases skyrocketed following recognition of the doctrine). Likewise, once the tort of intentional infliction of emotional distress was recognized in the workplace, "the number of cases in which plaintiffs alleged the tort either as an adjunct to other wrongful discharge theories, or as an independent lawsuit, multiplied exponentially." Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment At Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. Rev. 387, 404 (1994).

Plaintiffs routinely seek to bundle state tort claims and employment discrimination claims in the same suit, as petitioner did here. *See* J.A. 9–11 (pleading violations of Title VII, Equal Protection, § 1981, Due Process, and intentional interference with contract). *See also* James N. Dertouzos, Elaine Holland & Patricia Ebener, RAND Institute for Civil Justice, The Legal & Economic Consequences of Wrongful Termination 11 (1988), *available at* http://www.rand.org/pubs/reports/R3602.pdf.

ment litigation throughout the nation. There are millions of state and local government employees in the United States. Under petitioner's theory, every one of them could potentially have a federal constitutional claim arising from any adverse employment decision that the employee believes was based on animus but that the public employer believes had a rational basis.

Petitioner and her *amici* acknowledge that few if any of these Equal Protection claims can be resolved short of trial. *See* Pet. Br. 8 ("Engquist's case proceeded to an eleven-day trial"); *id.* at 42 ("a plaintiff must prove that the government's discrimination is not rationally related to a legitimate government purpose"); *id.* ("Engquist alleged malice and the jury can be said to have credited her evidence"); Br. *Am. Cur.* NEA, AFL-CIO & AAUP 25 (class-of-one claims require the plaintiff to plead and prove impermissible differential treatment by public employer). In the Ninth Circuit, for example, courts "'require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a searching inquiry'—one that is most appropriately conducted by the fact finder, on a full record.'" *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996), *cert. denied*, 519 U.S. 927 (1996); *see also* Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 Wash. L. Rev. 367, 415–24 (2003) (allegations of animus enable class-of-one claims to survive dispositive motions).

The real-world consequences of adopting petitioner's Equal Protection theory would thus be systemically disruptive, but there is at least one more

reason why it should be rejected. As she admits, almost none of the rational-basis class-of-one actions filed by employees are meritorious: "In practice, it has been difficult for plaintiffs to show that the government has failed to meet [the rational basis] standard, particularly in the context of public employment." Pet. Br. 41; *see also id.* at 35 ("[O]nly a handful of [class-of-one] claims have succeeded."); *id.* at 42 (success is possible for only a "tiny fraction of plaintiffs"); *Lauth*, 424 F.3d at 633–34 (surveying decisions of courts of appeals and finding "no 'class of one' cases in which a public employee has prevailed" between 1982 and 2005).

Petitioner asserts that "court conclusions of irrationality have been largely confined to cases in which the plaintiff employee demonstrates animus or improper motive." *Id.* at 41–42. But this is scarcely a limiting principle (as she contends) because employees who experience adverse treatment by their supervisors commonly attribute it to animus. *See* Pet. Br. 45 ("subjective intent . . . understandably plays a greater role in assessing the propriety of governmental employment decisions" than it does in challenges to government regulation).

Petitioner's Equal Protection theory is not only duplicative of state-created mechanisms, but leads to the worst of all possible worlds: the creation of a vast universe of potential plaintiffs who can assert fact-intensive constitutional claims that will almost invariably result in trials that they will lose, at great monetary and emotional cost to themselves, to the governmental defendants, and to the citizenry. Indeed, this result illustrates how attenuated petitioner's asserted constitutional interest is from the central purpose of the Equal Protection Clause. The

widespread and systemic costs of constitutionalizing the run-of-the-mill employee grievance overwhelm the utility of recognizing the class-of-one claim in the workplace—which, as petitioner admits, could never be vindicated for more than a "tiny fraction of plaintiffs." Petitioner has offered no reason for this Court to create a federal constitutional remedy that goes beyond those carefully tailored by state and local governments to redress grievances and tortious conduct where relief is warranted.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
# Supreme Court of the United States

ANUP ENGQUIST,
*Petitioner*,

v.

OREGON DEPARTMENT OF AGRICULTURE, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, IN SUPPORT OF PETITIONER

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IN THE

# Supreme Court of the United States

No. 07-474

ANUP ENGQUIST,

*Petitioner*,

v.

OREGON DEPARTMENT OF AGRICULTURE, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is filed on behalf of a coalition of employee organizations which collectively represent millions of workers employed by state and local governments, public school districts and universities, agencies of the federal government, and other public entities.[1] Directly or through their

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person

affiliates, *amici* represent their members in dealing with their employers in regard to the terms and conditions of their employment. In some situations, this representation may be based on rights that are guaranteed to public employees by the United States Constitution, including the right to equal protection of the laws established by the Fourteenth Amendment. The issue presented by this case—whether the Ninth Circuit was correct in categorically excluding government decisions involving public employment from the purview of the Equal Protection Clause in "class of one" cases—is accordingly of vital interest to *amici* and their members.

*Amicus* National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States.

*Amicus* American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of approximately 10.5 million working men and women. The AFL-CIO's affiliated unions represent employees at every level of government, in virtually every job from sanitation worker to teacher. For example, the American Federation of Teachers, AFL-CIO ("AFT") represents over 1.4 million employeees in public schools, community colleges, universities, state government, and health care; the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") represents over 1.5 million employeees

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other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

in state, county, and local governments; and the American Federation of Government Employees, AFL-CIO ("AFGE") represents approximately 600,000 federal and District of Columbia government workers.

*Amicus* American Association of University Professors ("AAUP") is a national membership organization consisting of approximately 45,000 college and university faculty, librarians, graduate students, and academic professionals, including both unionized public employees and those unprotected by collective bargaining agreements or tenure.

## SUMMARY OF ARGUMENT

**1.** The Ninth Circuit's exclusion of public employees from the coverage of the Equal Protection Clause in class-of-one cases marks a radical departure from this Court's constitutional jurisprudence, which—while striking a balance between public employees' rights as citizens and the government's particular needs as employer—has never held that a constitutional protection available to other litigants simply does not apply to public employees, thereby permitting the government to misuse its authority as employer for purposes unrelated to public administration. More specifically to the point, this Court's cases have consistently applied the Equal Protection Clause to government actions in the employment context.

**2.** The decision of the court below rests on policy more than on legal doctrine. But the court's concerns about upsetting personnel practices and abolishing employment at will in the public sector are misplaced. The commands of the Equal Protection Clause are in fact fully consistent with established public-sector employment practices. And that the

Equal Protection Clause prohibits the public employer from acting on certain impermissible grounds unrelated to employment hardly equates to a "just cause" regime inconsistent with the concept of employment at will.

**3.** The Ninth Circuit's concern about constitutionalizing everyday governmental decisions identifies a legitimate problem with which the lower courts have struggled. But the problem of cabining class-of-one claims extends beyond the context of public employment, and it is not solved by an arbitrary ban on such claims by public employees. The appropriate solution lies, rather, in the fuller development of the standards for class-of-one claims generally, pursuant to which a plaintiff should be required to plead and prove that she was intentionally treated differently from others similarly situated for a reason unrelated to any legitimate government objective.

## ARGUMENT

### I. THERE IS NO BASIS IN THIS COURT'S CONSTITUTIONAL CASES FOR THE NINTH CIRCUIT'S CATEGORICAL REJECTION OF EQUAL PROTECTION CLAIMS OF PUBLIC EMPLOYEES WHEN THEY OCCUPY A CLASS OF ONE

#### A. The Ninth Circuit's Decision Finds No Support In This Court's Cases Involving The Constitutional Rights Of Public Employees

It is now settled law that "[t]he First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees

who serve the government as well as to those who are served by them." *Collins v. City of Harker Heights*, 503 U.S. 115, 119-20 (1992). This Court has held that public employees can assert First Amendment rights, Fourth Amendment rights, Fifth Amendment rights, rights to due process, and other constitutional rights, including the right to equal protection, against their government employer. *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976) (freedom of association); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (freedom of speech); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (unreasonable search and seizure); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (compelled self-incrimination); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (due process); *Washington v. Davis*, 426 U.S. 229 (1976) (equal protection).

In each of these lines of cases, this Court has considered the public employer's legitimate need to retain the authority and discretion integral to managing its workforce. Yet in none of these areas has the Court struck the balance in favor of categorically barring public employees from asserting a constitutional right against their government employer, or from doing so using any theory available to other litigants. For example, under the Fourth Amendment this Court has "reject[ed] the contention . . . that public employees can *never* have a reasonable expectation of privacy in their place of work" *vis-à-vis* their government employer. *O'Connor*, 480 U.S. at 717 (emphasis added). Instead of entirely insulating the government's use of its power as employer from constitutional scrutiny, this Court has, in its prior cases, chosen to formulate standards for the adjudication of constitutional claims which do not interfere with effective and efficient public

administration but nevertheless protect public employees' constitutional rights.

The Ninth Circuit's holding in this case represents a radical departure from this Court's approach to public-employee cases not only because it categorically bars government workers—and only government workers—from asserting class-of-one claims, but also because that categorical bar permits the government to use its power as employer to invade the rights of its employees as citizens for reasons wholly unrelated to efficient public administration.

This Court's jurisprudence has attempted to strike a balance between public employees' rights as citizens and the government's needs *as employer*. This has been most explicit under the First Amendment. In *Pickering*, for example, this Court explained, "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, *as an employer*, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. This Court's prior decisions have sought "[t]o reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests *in performing its mission*." *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (emphasis added).

The Ninth Circuit's holding, in contrast, sweeps far beyond "the government employer's right to protect its own legitimate interests in performing its mission" because it protects the government employer's decisions even if they have nothing to do with performing its mission and, indeed, even if they are

inimical to its mission. In *Waters v. Churchill*, this Court explained:

> [T]he extra power the government has in this area comes from the nature of the *government's mission as employer*. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

511 U.S. 661, 674-75 (1994) (emphasis added). But the Ninth Circuit's decision grants government "extra power" simply because it is exercised through employment sanctions (such as termination) and even when its exercise is wholly unrelated to "the government's mission as employer."

In other words, the Ninth Circuit's decision permits the government to use its power as employer in a manner which, if it involved any other form of governmental authority, would violate the Equal Protection Clause, even when the use of that power is for purposes wholly unrelated to employment. The Ninth Circuit observes that "'[t]he paradigmatic class-of-one case should be one in which a public official, for some improper motive, 'comes down hard on a hapless private citizen.'" Pet. App. 25 (quoting *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005)). Yet this is exactly what the Ninth Circuit's decision permits. Under the Ninth Circuit's rule, the government can treat the "hapless private citizen" who happens to be a government employee differently than another similarly-situated citizen-

employee, and—"without any rational basis and solely for arbitrary, vindictive, or malicious reasons"[2] having nothing to do with the employment relationship—impose a range of sanctions on him or her, including termination.[3]

No prior decision of this Court concerning the constitutional rights of public employees wholly insulates the exercise of the state's power as employer from constitutional scrutiny even when that power is exercised for reasons unrelated to employment. In *Pickering*, for example, this Court recognized, that in some circumstances, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S. at 573. The same is true when the government uses its power as employer in a manner that treats one employee differently than another for arbitrary and even malicious reasons wholly unrelated to employment. In such a case, as in *Pickering*, "it is necessary to regard the [public employee] as the member of the general public he seeks to be." 391 U.S. at 574.

Yet the Ninth Circuit's decision permits just such an abuse of power solely because it is the power of employment. The Ninth Circuit's decision insulates the state's use of its power as employer, rather than

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[2] As the jury found in this case, *see* Pet. App. 4.

[3] Of course, employment sanctions, particularly termination, represent a potent form of state power. This Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985).

accommodating the state's unique needs as employer, and it is therefore contrary to this Court's clear command that "[t]he provisions of the 14th Amendment . . . relate to and cover all the instrumentalities by which the state acts." *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907). In *Connick v. Myers*, this Court stated, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." 461 U.S. 138, 147 (1983). In order to fulfill that responsibility, this Court must reverse the Ninth Circuit's categorical rejection of public-employee class-of-one claims.

Of course, this Court cannot "ignore the 'commonsense realization that government offices could not function if every employment decision became a constitutional matter.'" *San Diego*, 543 U.S. at 83 (quoting *Pickering*, 461 U.S. at 143). But the Ninth Circuit's holding insulates decisions that should not be classified as "employment decisions." And this Court has never accepted arguments for restricting public employees' constitutional rights based on interests that "are not interests that the government has in its capacity as an employer." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 n.4 (1990).

Nor has this Court ever accepted the mere inconvenience of judicial scrutiny of personnel decisions (which we demonstrate below has been and will remain minimal in this instance) as a proper basis for limiting government employees' constitutional rights. This Court has recognized the fact that "[t]he operational realities of the workplace" may insulate actions by the government as employer that would be subject to challenge if taken by the government outside the employment context. *O'Connor*, 480 U.S. at 717. But

what this Court has "balanced" against individual rights has been "the realities of the workplace," not simply the inconvenience of the minimal judicial oversight needed to insure that workplace powers are not abused to achieve objectives unrelated to operational needs. The government is constrained by the Constitution and private employers are not. Government decisions, even employment decisions, are subject to constitutional scrutiny while private decisions are not. Thus, this Court has long recognized, "[T]he state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 897-98 (1961).

In *Rutan*, this Court expressly rejected the Seventh Circuit decision to limit the proscription of patronage practices to the context of termination or the "substantial equivalent of a dismissal," 497 U.S. at 75, on the grounds that "the opposite conclusion would open state employment to excessive interference by the Federal Judiciary." *Id.* at 76 n.8. This Court stated, "We respect but do not share this concern." *Id.* "The . . . fears of excessive litigation," this Court similarly held in *Board of County Comm'rs v. Umbehr*, "cannot justify a special exception to our [constitutional] precedent." 518 U.S. 668, 681 (1996).

And even if it were a proper basis for categorically curtailing public employees' constitutional rights, the specter of a flood of litigation conjured up by the Ninth Circuit has no basis in logic or experience. As we explain below in Part II, most public employees have more promising grounds and less expensive and more expeditious means of challenging arbitrary, adverse actions than filing constitutional claims in

federal or state court. Thus, of the many types of government decisions made every day, employment decisions are among the least likely to result in class-of-one claims. Moreover, as we discuss in Part III, only rare cases of abusive discrimination will result in a colorable class-of-one claim.

For these reasons, as Judge Reinhardt states in his dissent, "The seven circuits that have recognized the theory . . . [have not been] drowning in the 'flood' of class-of-one employment disputes feared by the majority." Pet. App. 65. Indeed, as Petitioner points out, nine circuits have recognized the theory and there is no evidence of a flood in any of them. *See* Brief for the Petitioner 22, 52 (162 cases filed in all circuits since *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), was decided). Even Respondent concedes that:

> There may be millions of government employees, but the number of successful class-of-one equal protection claims brought by public employees against their employers is almost nil. Thus, even if this Court were to grant certiorari and reverse the decision of the court of appeals, the outcome in very, very few cases would be changed.

Brief in Opposition 23. "The lack of success of most plaintiffs in these circuits demonstrates the ability of the courts to allow for recovery under the class-of-one theory without constitutionalizing every employment dispute," as Judge Reinhardt correctly points out. Pet. App. 65.

The fear of "deluging federal courts with claims" has been a recurring one in the adjudication of public employees' constitutional claims. *Davis v. Passman*, 442 U.S. 228, 248 (1979). Yet while this Court has

consistently declined to close the courthouse door to public employees, no such deluge has occurred, either of class-of-one claims or of any of the other myriad constitutional claims this Court has carefully tailored to fit the public-employment relationship.

The Ninth Circuit's opinion offers no colorable reason why—rather than developing standards that take account of the governmental interests specific to the employment context, as the Court has done in applying other provisions of the Constitution—the concern with government's needs as employer requires a categorical exclusion of public employees from the protection of the Equal Protection Clause in class-of-one cases, whether or not the government's action was based on legitimate employment concerns. This Court has never resorted to such a categorical exclusion of public employees in order to accommodate the government's interests as employer. And, as we demonstrate below in Part III, there is no need to do so here.

### B. The Ninth Circuit's Decision Finds No Support In The Law Of Equal Protection

Turning to the specific question presented under the Equal Protection Clause, we begin with two observations that are beyond dispute. There is, in the first place, no question that, as a general matter, the Equal Protection Clause constrains the actions of governmental entities, in their capacities as employers, in their relationship with their employees. Indeed, the proposition is so well established that this Court, routinely and without question, scrutinizes the employment actions of governmental entities pursuant to the Equal Protection Clause.

And that is true whether or not the public-employee plaintiff alleges differential treatment on a basis that requires some degree of heightened scrutiny. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (layoffs of nonminority teachers pursuant to affirmative action plan violated Equal Protection Clause); *Washington v. Davis*, 426 U.S. 229 (1976) (use of allegedly racially discriminatory personnel test upheld under Equal Protection component of Fifth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (termination of employment because of gender violated Equal Protection component of Fifth Amendment); *Gregory v. Ashcroft*, 501 U.S. 452, 470-73 (1991) (mandatory retirement age upheld as rational under Equal Protection Clause); *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 199-201 (1979) (per curiam) (non-renewal of teachers failing to comply with continuing education requirements upheld as rational under Equal Protection Clause).

A second point is equally clear. While, as we discuss below in Part III, the standard for pleading and proving a class-of-one claim has been the subject of considerable confusion in the wake of this Court's decision in *Olech*, the central holding of the unanimous Court in that case is beyond question: when a government defendant is alleged to have denied equal protection of the laws to an individual, it matters not whether the alleged discrimination was based on the plaintiff's membership in a class comprising one, two, or many members.

It might well be thought that these two propositions, taken together, would suffice to establish the subsidiary proposition that denial of equal protection to members of a "class of one" is unconstitutional in the context of public-employment decisions, as it is

with regard to other government actions—and indeed nine of the ten Circuits that have had occasion to apply this Court's *Olech* decision in the public-employment setting have seen no reason to create an exception for a category of government decisions that is otherwise indisputably covered by the Equal Protection Clause. *See* Brief for the Petitioner 22 & nn.9-10 (citing cases).

In reaching the contrary conclusion, the Ninth Circuit suggested no doctrinal basis for excepting public employment from the purview of the Equal Protection Clause when—and apparently only when—the employer's impermissible animus is directed at a class comprising only the plaintiff. Nor can we discern any reasoned way to reconcile that exception with the law of Equal Protection generally.

The Ninth Circuit did, to be sure, point to the government's broader powers as employer as a justification for the exception. Pet. App. 23-25. But not only does that reasoning fail (as discussed above) to justify the categorical insulation of the use of the state's power as employer even for purposes unrelated to employment; it also fails to explain the basis for the state of the law created by the Ninth Circuit's holding—that the Equal Protection Clause protects public employees from discriminatory treatment targeted at a protected class (as to which some form of heightened scrutiny is appropriate), and from discriminatory treatment targeted at a non-protected class (which is evaluated under a rational-basis standard), but not from discriminatory treatment that targets a class of which the plaintiff is the only member. If there is a reason why the government's role as employer justifies excluding public employees from the ambit of the Equal Protection Clause in the

latter case but not the two former, the Ninth Circuit did not explain it.

Many employment decisions affect a class of more than one that is not a protected class to which heightened scrutiny applies—for example, when the employer lays off certain employees but not others or pays employees in one classification more than in another—and it cannot be that the applicability *vel non* of the Equal Protection Clause turns on how many members the class embraces. Indeed, this Court has specifically so held. *Olech*, 528 U.S. at 564 n.* ("the number of individuals in a class is immaterial for equal protection analysis").

In point of fact, the Ninth Circuit's decision appears to rest more on concerns of policy than on any exegesis of legal doctrine. Allowing public employees to bring class-of-one claims would, the court feared, "upset long-standing personnel practices" and "completely invalidate the practice of public at-will employment," Pet. App. 25, and would effectively constitutionalize public-sector employment law, "requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one." *Id.* at 26. As we now explain, both kinds of policy concerns are unfounded.

## II. THE NINTH CIRCUIT'S POLICY CONCERNS ABOUT THE IMPACT OF CLASS-OF-ONE CASES ON PUBLIC EMPLOYMENT PRACTICES ARE MISPLACED

**A.** The Ninth Circuit's decision not only creates a wholly unprecedented categorical bar on public employees' assertion of a constitutional claim available to all other persons aggrieved by state action, it does so based on its own, idiosyncratic notion of what

is necessary for efficient public administration—a notion contradicted by over a century of consistent legislative judgment to the contrary. The Ninth Circuit elevates the public employer's presumed ability to be *completely* arbitrary over public employees' constitutional right to equal protection. As Judge Reinhardt correctly observes in his dissent, the majority "believes that arbitrary treatment of public employees is a necessary and acceptable part of public employment." Pet. App. 64. But the Ninth Circuit's policy judgment is not only an illegitimate basis for judicial curtailment of constitutional rights, it is contrary to the theory of public administration almost universally accepted by the elected branches of government.

As this Court has recognized, Congress as well as the legislative branch of virtually every state have already "weighed the competing policy considerations and concluded that efficient management of government operations did not preclude the extension of [a set of civil service rights much more extensive than the narrow prohibition at issue in this case] to government employees." *Bush v. Lucas*, 462 U.S. 367, 384 (1983). Contrary to the Ninth Circuit's view, the legislative branches have concluded that protection against arbitrary treatment "would improve the efficiency and morale of the civil service. 'It will do away with the discontent and suspicion which now exists among the employees and will restore that confidence which is necessary to get the best results from the employees.'" *Id.* at n.24 (quoting 48 Cong. Rec. 4654 (1912)). Indeed, the Office of Personnel Management points to "the indispensable role played by the merit system in representative government." *See* Office of Personnel Management, *Biography of an Ideal* (available at https://www.opm.gov/Biographyof

AnIdeal/PU_SStext.htm). The protection against arbitrary treatment that the legislative and executive branches have deemed central to effective public administration extends to protection of constitutional rights. Thus, the U.S. Civil Service Commission reported in 1972 that "merit principles . . . also mean protection of individual constitutional rights" and that those principles "help Government, as an employer, to attract, select, retain, and utilize people with demonstrated ability to serve the public well." U.S. Civil Service Commission, *Eighty-Ninth Annual Report* 1 (1973).

As a result of this legislative consensus, "Federal civil servants [and civil servants in virtually every state] are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action." *Bush*, 462 U.S. at 385. Today, over 90% of the federal workforce works under some form of merit system, according to the Office of Personnel Management. *See Biography of an Ideal*, *supra*. The overwhelming majority of states have similarly adopted comprehensive merit systems for large portions of their workforces. *See* Lawrence D. Greene, *Federal Merit Requirements: A Retrospective Look*, 11 Public Personnel Management J. 53 (1982). Indeed, at least twelve states mandate merit systems in their constitutions.[4] Of course, one of the "central principles" of the merit system is "absence of arbitrary removals." Subcommittee on

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[4] *See* Alaska Const. art. XII, § 6; Cal. Const. art. VII, § 1; Colo. Const. art. XII, § 13; Ga. Const. art. IV, § III, ¶ I; Haw. Const. art. XVI, § 1; Kan. Const. art. 15, § 2; La. Const. art. X, § 8; Mich. Const. art. XI, § 5; Mo. Const. art. IV, § 19; N.J. Const. art. VII, § 1, ¶ 2; N.Y. Const. art. V, § 6; Ohio Const. art. XV, § 10.

Manpower and Civil Service of the Committee on Post Office and Civil Service, House of Representatives, *History of Civil Service Merit Systems of the United States and Foreign Countries*, Comm. Print No. 94-29, 94th Cong., 2d Sess. 7 (Dec. 31, 1976).

The Ninth Circuit's peculiar prescription for effective public administration not only contradicts the virtually uniform judgment of the legislative branches of the federal and state governments, it is also internally contradictory. On the one hand, the court suggests that the need for constitutional protection "'is especially thin' given the number of other legal protections that public employees enjoy." Pet. App. 25 (quoting *Lauth*, 424 F.3d at 633). On the other hand, it asserts, "A judicially-imposed constitutional proscription of arbitrary public employer actions would also upset long-standing personnel practices. . . . [E]mployers have traditionally possessed broad discretionary authority in the employment context. The power of employers to discharge employees for reasons that may appear arbitrary, unless constrained by contract or statute, is well-established under the common law of at-will employment." Pet. App. 25. But both propositions cannot be true: Either public employees do not need the Equal Protection Clause's protection against wholly arbitrary or malicious treatment because such protection exists elsewhere, or extending such protection would work a significant change in public personnel administration.

The Ninth Circuit's holding rests on the latter assumption: "Applying equal protection to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of public

at-will employment. . . . We decline to effect such a significant change in employment law under the general provisions of the Fourteenth Amendment." *Id.* at 25-26. But the court provides no evidence that a contrary holding would "effect . . . a significant change in [public sector] employment law." It cites only two decisions, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), both relating solely to *private-sector* employment. *See* Pet. App. 25. The indisputable facts of contemporary *public* administration are to the contrary.

**B.** There is another flaw in the Ninth Circuit's prediction of dire consequences for public administration. Even assuming, contrary to fact, that large numbers of public employees are employed at will, the Ninth Circuit is simply incorrect when it states that "[a]pplying equal protection to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of public at-will employment." Pet. App. 25. Of course, no public employee in any jurisdiction is employed wholly at-will. Under both federal and state law, some reasons for discharge are unlawful, for example sex, race, and national origin. *See* 42 U.S.C. § 2000e-2(a)(1). In the public sector, additional reasons are unlawful, for example, party affiliation. *See Elrod*, *supra*. Continued adjudication of public employee class-of-one claims would simply mean that there would continue to be one more narrow exception to the employment-at-will rule in those relatively few instances where public employees are employed at will. This would hardly "completely invalidate the practice of public at-will employment" as the Ninth Circuit suggests, for "[t]here is a clear distinction between the grant of tenure to an employee . . . and the prohibition of a

discharge for a particular impermissible reason." *Rutan*, 497 U.S. at 80-81 (Stevens, J., concurring).

In a jurisdiction where employment at will is "completely invalidate[d]," an employer is required to have just cause for its adverse actions. *See, e.g.*, Mont. Code Ann. § 39-2-904(2) (barring discharge of employees after probationary period absent just cause). Under a just-cause standard, an employer must not only come forward with evidence of a proper motive for its actions, but must carry the burden of proof. *See Elkouri & Elkouri, How Arbitration Works* 949 (Alan Miles Ruben 6th ed. 2003) ("The burden of proof is generally held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires just cause for discipline.").

The situation under the existing, narrow exceptions to the employment-at-will rule, including the class-of-one equal protection exception, is entirely different: "It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration." *Rutan*, 497 U.S. at 80 (Stevens, J., concurring). The employer bears no burden of proof; rather it is the employee, in the class-of-one context, who must prove both that he or she was intentionally treated differently than a similarly situated employee and that the action was taken for reasons unrelated to any legitimate government purpose. And the employer need not build a factual case against the employee or cite specific failures of performance, but remains free, during an employee's probationary period, for example, to terminate the employee based on a vague feeling that the employee does not fit well in the position. Unless the employee can prove that a similarly situated employee was intentionally treated

differently and that the asserted work-related rationale (however vague) was a pretext for malicious or otherwise improperly motivated action, the employer's virtually unfettered discretion remains intact. Such a modest exception hardly spells the end of employment at will in the limited situations where it is the rule in public-sector employment.

## III. THE POLICY CONCERN ABOUT CONSTITUTIONALIZING ROUTINE GOVERNMENTAL DECISIONS IS NOT LIMITED TO THE CONTEXT OF PUBLIC EMPLOYMENT, AND ITS SOLUTION LIES IN THE ELABORATION OF A GENERALLY APPLICABLE STANDARD FOR PLEADING AND PROVING CLASS-OF-ONE CLAIMS

The second policy issue upon which the Ninth Circuit based its decision was its fear of constitutionalizing myriad routine government decisions. That is, to be sure, an entirely legitimate concern. But the Ninth Circuit's solution of categorically excluding public employees from the coverage of the Equal Protection Clause in class-of-one cases neither measures the full scope of that problem nor resolves it in more than a very limited and unsatisfactory fashion. Not only is there no doctrinal basis for the exception crafted by the Ninth Circuit, but the court's solution resolves only a small portion of the much larger problem with which the lower federal courts have struggled in the wake of *Olech*—how to cabin the class-of-one cases in a way that avoids "effectively provid[ing] a federal cause of action for review of almost every executive or administrative decision made by state actors." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004).

That problem extends far beyond the area of public employment, and its solution, we respectfully submit, lies not in arbitrarily excluding public employment from this corner of Equal Protection law, but rather in a further explication of the generally applicable standard for pleading and proving class-of-one claims.

### A. The Lower Courts Have Struggled With The Problem Of Cabining Class-Of-One Claims In A Variety Of Contexts

Carving out its exception for public employment, the Ninth Circuit worried that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . ." Pet. App. 24 (quoting *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976)). But the potential problem of constitutionalizing the myriad of decisions made daily by government administrators is by no means limited to "personnel" decisions or to the context of public employment. To the contrary, the class-of-one cases decided by the courts of appeals in the eight years since *Olech* have involved cases challenging every type of routine governmental action, ranging from land-use, zoning, licensing, and tax assessments to policing and prosecutorial decisions[5]—and in many of these cases the courts have

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[5] To cite only a handful of examples, *see Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202 (10th Cir. 2006) (reclassification, for tax assessment purposes, of property use); *Campbell v. Rainbow City*, 434 F.3d 1306 (11th Cir. 2006) (denial of zoning variances); *Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004) (reluctance of police investigators to prosecute); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004) (discriminatory enforcement of environmental

wrestled with the same concerns articulated by the Ninth Circuit about cabining the class-of-one doctrine in a way that does not result in routine constitutional review of government decisions. *See, e.g.*, *Bell v. Duperrault*, 367 F.3d 703, 712-13 (7th Cir. 2004) (Posner, J., concurring); *Jennings*, 383 F.3d at 1210-12.

That task has not been made easier by the lower courts' uncertainty about the proper interpretation of this Court's brief opinion in *Olech*, and in, particular, about the standard that should be required for pleading and proving class-of-one claims. As Judge Posner has observed in soliciting this Court's "enlighten[ment]" on that score, "the post-*Olech* cases are all over the map." *Bell*, 367 F.3d at 711 (concurring op.). And the difficulty is focused precisely on the problem of avoiding routine constitutional review of government administrators' decisions:

> In the wake of *Olech*, the lower courts have struggled to define the contours of class-of-one cases. All have recognized that, unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors.

*Jennings*, 383 F.3d at 1210-11.

In short, the Ninth Circuit's categorical exclusion of public employment from the purview of the Equal

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regulations); *Bell v. Duperrault*, 367 F.3d 703 (7th Cir. 2004) (denial of permit to extend a pier); *Nevel v. Village of Schaumburg*, 297 F.3d 673 (7th Cir. 2002) (revocation of building permit); *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000) (unequal police protection).

Protection Clause, insofar as class-of-one cases are concerned, fails to address the broader problem of how the class-of-one doctrine can be cabined in a way that is both consistent with Equal Protection law generally and that does not systematically "transform many ordinary violations of city or state law into violations of the Constitution." *Olech*, 528 U.S. at 565 (Breyer, J., concurring). Nor does it offer a solution to the widespread disarray in the lower courts, in the wake of *Olech*, over the proper standard for pleading and proving a class-of-one claim.

### B. The Problem Of Appropriately Cabining Class-Of-One Claims—In Employment Cases Or Otherwise—Can Be Resolved By Further Articulation Of The Standard For Pleading And Proving All Such Claims

The issue that troubles and divides the lower courts is not, in short, whether Equal Protection law categorically excepts public employment from class-of-one cases, but rather how to develop a standard for pleading and proof of such cases that appropriately constrains federal-court review of everyday government decisions.

This Court could, of course, resolve the case before it simply by reversing the Ninth Circuit's decision barring all class-of-one cases in the public-employment context and leaving for another day the elaboration of standards for pleading and proving class-of-one cases. But the Court may also wish to use this case to give further guidance on the latter issue. At the very least, the Court should be cognizant, in answering the question upon which review was granted, of the availability of a remedy

for the Ninth Circuit's policy concern about routinely constitutionalizing government decisions—a remedy which is consistent with this Court's public-employee and Equal Protection cases, which truly resolves the problem the Ninth Circuit identified, and which does not categorically and arbitrarily exclude from the purview of the Equal Protection Clause one class of cases that accounts for only a portion of the problem. To that end we offer the following analysis of the appropriate standard for pleading and proving class-of-one cases.

### 1. *A Class-Of-One Plaintiff Must Plead And Prove That She Was Intentionally Treated Differently Than Others Similarly Situated For Reasons Unrelated To Any Legitimate Government Objective*

**a.** Any Equal Protection claim based on state actors' administrative or executive decisions will require the plaintiff to plead and prove that he or she was (1) intentionally (2) treated differently from others similarly situated, and (3) that the reason for such intentionally disparate treatment was an impermissible one.

The requirement that the differential treatment must have been intentional is well established in Equal Protection law generally, *Washington v. Davis*, 426 U.S. 229 (1976), and if properly applied it suffices to dispose of the concern that mere errors or inadvertent differences in government administrators' application of the law to different persons could form the basis for a cause of action under the Equal Protection Clause. As this Court has explained, "[t]he unlawful administration by state

officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *see also id.* at 15 (Frankfurter, J., concurring) ("[T]o give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment.").

While the element of differential treatment from others similarly situated can entail difficult issues of proof,[6] the showing that the government treated the plaintiff(s) differently from other similarly situated

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[6] Showing that the plaintiff who alleges discriminatory treatment was similarly situated to others who were not so treated is a standard element of discrimination cases, whether statutory or constitutional, and there is no reason why this element should be treated any differently in class-of-one cases. In particular, it should be open to plaintiffs in appropriate cases to prove this element by inference—for example, by showing that the government's action was motivated by concerns so far outside the realm of legitimate government purposes that, absent an illegitimate motivation, any hypothetical comparator necessarily would have been treated differently. *Cf.* Pet. App. 66 (Reinhardt, J., dissenting) ("There is no need for an identically situated comparator in cases involving malice because the government does not ordinarily treat people maliciously, and, thus, is obviously treating individuals unequally under such circumstances."); Brief for the Petitioner 43 ("[C]ourts use evidence of malice and vindictiveness as a proxy for other elements that a plaintiff must prove," including "the existence of similarly situated comparators."). The possibility of proving discriminatory treatment by inference is particularly significant where the plaintiff holds a unique position—such as, for example, the head of a governmental department—and would be hard pressed to identify other employees similarly situated in all relevant respects.

persons is obviously part of any Equal Protection claim, for "[i]t is this comparative element that distinguishes the Equal Protection Clause from the Due Process Clause." *Jennings*, 383 F.3d at 1213 (citing *Ross v. Moffitt*, 417 U.S. 600, 609 (1974)).

It is the third element that is most directly related to the difficulties the lower courts have experienced in applying *Olech*. In the more usual Equal Protection case, of course, the impermissible motive that is alleged to have resulted in the denial of equal protection is the consideration of plaintiff's membership in some class—whether it is a class that is afforded some level of heightened scrutiny (such as a class defined by race) or one that is not afforded any such heightened protection (such as a class defined by age, sexual orientation, or perhaps eye color), so that alleged discrimination on the basis of membership in that class is evaluated under a rational basis standard. In these cases, the discriminatory treatment that the plaintiff claims to have suffered is alleged to have been motivated by the impermissible consideration of membership in the class—impermissible because not rationally related (at a minimum) to any legitimate government objective.

But the impermissible motive demonstrated by showing that the government discriminated against the plaintiff because of the plaintiff's membership in a disfavored class is logically no more than a special case of the more generic requirement that to show a denial of equal protection one must show that the reason for the discriminatory governmental action was unrelated to any legitimate government objective.

Put differently, it is the governmental actor's allegedly impermissible motive in treating the plain-

tiff differently that *defines* the class against which the discriminatory treatment is directed – whether the discriminatory animus is alleged to be directed against a conventionally large class (blacks, women, gays, disabled persons, etc.) or against a "class of one." The latter type of class—whether in reality it contains one, two, or five individuals, *see Olech*, 528 U.S. at 564 n*—can be defined as consisting of those persons alleged to have been treated differently because of, for example, animus stemming from a previous lawsuit, *Olech*, 528 U.S. at 563, a desire to protect the local football team from embarrassment, *Jennings*, 383 F.3d at 1211, personal hostility, *Bell*, 367 F.3d at 708; *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945-48 (9th Cir. 2004); a hostile mother-in-law, *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000), or the need for a scapegoat, *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982).

These allegations of a reason *unrelated to any legitimate government objective* for the discriminatory treatment the plaintiff alleges thus serve the same purpose as the more conventional allegations of discriminatory treatment on account of race, gender, age, and the like—they offer an answer to the question *why* the plaintiff was treated differently from other similarly situated persons. Just as a conventional Equal Protection plaintiff cannot survive a motion to dismiss without alleging (for example) that the reason for the differential treatment was his or her race—and cannot survive summary judgment without offering appropriate proof of that allegation—so too is it appropriate to require a class-of-one plaintiff to identify the reason why he or she was treated differently.

In sum, we submit that what a class-of-one plaintiff must plead, and subsequently prove, is that he or she was intentionally treated differently than others similarly situated for a reason unrelated to any legitimate government objective.

**b.** We recognize that this formulation of the pleading and proof standard for class-of-one claims may be in some tension with this Court's opinion in *Olech*—but we submit that upon examination the discrepancy is more apparent than real.

In *Olech*, the Court explained that it had recognized Equal Protection claims based on discrimination against a "class of one" in cases "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is *no rational basis for the difference in treatment*." 528 U.S. at 564 (emphasis added). Holding that these allegations were sufficient to state a cause of action, the Court determined that it need not reach any question of "subjective ill will" on the part of the government decision-makers. *Id.* at 565.

The Court's formulation, elaborated only briefly in its short *per curiam* opinion, was controversial from the start. Concurring in the result, Justice Breyer considered the "added factor" of "'vindictive action,' 'illegitimate animus,' or 'ill will'" necessary to prevent "transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.* at 566. And just weeks after *Olech* was decided, the Seventh Circuit—fearing that the formulation "irrational and wholly arbitrary" articulated by this Court would be insufficient to prevent the federal courts from being "drawn deep

into the local enforcement of petty state and local laws"—held that it would

> gloss "no rational basis" in the unusual setting of "class of one" equal protection cases to mean that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws *for reasons of a personal nature unrelated to the duties of the defendant's position*.

*Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (emphasis added).

In a subsequent opinion Judge Posner explained that the formulation "reasons of a personal nature" did not mean only personal animus on the part of the governmental actor, but extended to any "improper motives for a public official":

> It should be noted that "reasons of a personal nature unrelated to the duties of the defendant's position" go beyond personal hostility to the plaintiff (i.e., animus), the motive emphasized in our *Olech* opinion and in Justice Breyer's concurrence. Personal reasons can include larceny, as in *Forseth v. Village of Sussex*, 199 F.3d 363, 371 (7th Cir. 2000), or a desire to find a scapegoat in order to avoid adverse publicity and the threat of a lawsuit, as in *Ciechon v. City of Chicago* . . . , 686 F.2d at 524—improper motives for a public official (scapegoating is not a legitimate tactic of public officials any more than stealing is), but different from personal hostility.

*Bell*, 367 F.3d at 710 (Posner, J., concurring).

In short, the Seventh Circuit reads *Olech* to require that the class-of-one plaintiff must have been in-

tentionally deprived of the equal protection of the laws for a reason unrelated to any legitimate government objective—whether that reason is personal animus or some other improper motivation. Because the motive for the discriminatory treatment is an improper one, the government's treatment of the plaintiff is necessarily "irrational" or "arbitrary," when measured against legitimate government objectives, and in that sense "there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564.

That formulation is, we believe, an appropriate elaboration of this Court's holding in *Olech*. It is, to be sure, possible to read the terms "no rational basis," 528 U.S. at 564, and "irrational and wholly arbitrary," *id.* at 565, as allowing a class-of-one plaintiff to prevail upon a showing that the government defendant discriminated against the plaintiff for no reason at all. But people tend to act for reasons, and it is difficult to see how a governmental action could be *intentionally* arbitrary and irrational—as it must be—without the existence of some "personal" motive (in Judge Posner's sense), *i.e.*, a motivation unrelated to any legitimate government interest.

Properly understood, therefore, the Seventh Circuit's formulation that a class-of-one plaintiff must plead and prove a "personal" or "improper" motive for the government's discriminatory action is merely an elaboration of *Olech*'s holding that the discriminatory treatment must be both "intentional" and "arbitrary."

This development of a more elaborated standard for pleading and proving class-of-one claims should ensure that the Equal Protection Clause does not, as the Ninth Circuit feared, "provide a federal cause of action for review of almost every executive or

administrative government decision." Pet. App. 22. The requirement that a class-of-one plaintiff plead and prove discriminatory treatment that was both intentional and the result of an illegitimate motive appropriately limits class-of-one claims—whether in the context of public-employment decisions or otherwise—to those in which the government has indeed acted intentionally to deny the plaintiff the equal protection of the laws.

### 2. *The Government Defendant Cannot Escape Liability Merely By Hypothesizing A Rational Motivation For The Differential Treatment*

Several of the cases in which the lower courts have endeavored to develop pleading and proof standards for class-of-one claims have held that the plaintiff cannot prevail if there was *any possible rational basis* for the government's action, and indeed that the defendant need only articulate, not prove, an imaginable rational basis in order to escape liability. *Lauth*, 424 F.3d at 634; *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1209-12 (10th Cir. 2006).[7]

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[7] We note, as an initial matter, that the proper inquiry is not whether there was a rational basis for the government action *per se*—denying a license, failing to provide police protection, firing an employee—but rather whether there was a rational basis, in taking this action, for treating the plaintiff differently from others similarly situated. Otherwise, there could never be an Equal Protection claim in any case in which the government was acting within a range of permissible discretion—no matter how egregiously differently that discretion was exercised to the disadvantage of the plaintiff, as compared to others similarly situated. For example, the government's action in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in denying a permit for a laundry

We certainly agree that a defendant can and should escape liability in cases in which the disparate treatment of the plaintiff in fact rested on a rational basis, *i.e.*, one related to a legitimate government purpose—and that is so even if the defendant is shown to have been motivated *also* by improper animus. The courts have a well-established, time-tested tool for sorting out just this sort of problem—the "mixed motive" analysis of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, a defendant whose acts were substantially motivated by an improper purpose can nonetheless escape liability by showing that he would have taken the same action even absent the improper motivation.[8]

But it is one thing to say that the defendant in a class-of-one case can prevail by showing that there was, in fact, a rational and legitimate basis for treating the plaintiff differently, and quite another to suggest that there can be no violation of the Equal Protection Clause as long as the defendant is able to

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in a wooden building would hardly have been irrational if considered in isolation; it became irrational and impermissible only because permits were denied to one class of applicants based on the impermissible consideration of their national origin. Accordingly, as this Court put it in *Olech*, the relevant question is whether there is a "rational basis *for the difference in treatment*." 528 U.S. at 564 (emphasis added).

[8] As applied to the facts of the *Olech* case, for example, even if the Village officials who insisted on the 33-foot easement were shown to have been driven by animus stemming from the Olech family's previous successful lawsuit against the Village, Ms. Olech would still lose if the Village were able to establish that it also had a rational and proper reason for seeking a broader easement in her case and that it would have done so even absent any improper animus or retaliatory motive.

*hypothesize* a rational basis for the differential treatment. The Seventh Circuit arrived at that position by observing that "a plaintiff who does not belong to any 'suspect' (that is, favored) class—by definition, the situation of a class-of-one plaintiff—must, to prevail, 'negative any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Lauth*, 424 F.3d at 634.

But this analysis confuses the inquiry in cases dealing with legislative classifications—where (absent any heightened scrutiny) the court looks only to whether there could be any conceivable rational basis for the legislature's classification—with cases involving administrative and executive actions. In the latter cases, the principal inquiry (which normally does not arise in cases involving legislative classifications) is usually one of fact—why did the government actor treat the plaintiff differently from others similarly situated? In an employment case, for example, the question might be whether the plaintiff was fired because of her religion or because of inadequate job performance. In a class-of-one case, the inquiry would be similarly factual, *e.g.*, whether the firing was because of inadequate job performance or (as in Judge Reinhardt's example) "because the employee's sister refused [the supervisor's] sexual advances." Pet. App. 64 (dissenting op.).

Such questions are resolved by application of the usual analytical and evidentiary tools, including the burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). But these factual questions are not resolved by looking to what, hypothetically, *could have* motivated the defendant.

There is no question that the motives typically alleged in class-of-one cases have nothing to do with a protected class or a fundamental right, and thus the permissibility of government acting on the basis of those motives (or classifications) is evaluated under a rational basis standard. But the antecedent factual question of why the plaintiff was treated differently than others similarly situated nevertheless cannot be avoided simply by hypothesizing a legitimate reason for the different treatment. The issue is not whether a rational basis for treating the plaintiff differently can be imagined, but rather whether, in fact, the plaintiff was denied the equal protection of the laws by being intentionally treated differently than others similarly situated for reasons unrelated to any legitimate government objective.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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IN THE
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ANUP ENGQUIST,

*Petitioner*

*v.*

OREGON DEPARTMENT OF ARGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

*Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

# BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace.

NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has a strong interest in insuring that the full panoply of constitutional rights, including equal protection, are available to public servants.

To ensure that the rights of working people are protected, NELA has filed numerous amicus curiae briefs before the United States Supreme Court and the federal appellate courts regarding the interpretation and application of statutory

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

rights. See e.g., *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Adams v. Florida Power Co.*, 535 U.S. 228 (2002).

## SUMMARY OF ARGUMENT

The Ninth Circuit's prediction of a torrent of employment claims based upon *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) is unsupported by empirical evidence and inconsistent with practical experience. As such, concerns about a "flood" of litigation cannot be a basis for denying public employees the right to bring "class-of- one" equal protection claims.

## ARGUMENT

This brief addresses the concern articulated by the Ninth Circuit in *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985 (9th Cir. 2007), that "applying the class-of-one theory to public employment would. . .generate a flood of new cases, requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one." *Id.* at 995. This fear is groundless; it is wholly unsupported by facts and by the experience of the Circuits.

This Court has previously relied upon actual experience to discount the specter that allowance of certain claims will open "floodgates." *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300, 115 S.Ct. 2144, 132 L.Ed.2d 226 (1998)(11

years of experience suggests that argument claiming potential flood of litigation is wrong); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.11, 106 S.Ct. 1233, 90 L.Ed. 623 (1986), superceded by statute, (20 years of operation of Part B of Medicare program raises serious doubts about claims of future inundation). As in *Rambo* and *Bowen*, this Court need not speculate as to what *might* happen. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits have all applied the class-of-one theory to public employees since *Olech*. *Engquist*, *supra*, 478 F.3d at 993 (collecting cases); *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004); *Howard v. Columbia Pub. Sch. Dist.*, 363 F.3d 797 (8th Cir. 2004). Far from creating a "flood" of litigation, reliance on the class-of-one theory has been relatively rare since 2000. *See Engquist*, supra, 478 F.3d at 1013 (Reinhardt, J., dissenting): "Nor are those circuits drowning in the 'flood' of class-of-one employment disputes feared by the majority." As the Petitioner aptly notes, there have been "only 162 reported public employment cases – approximately 24 cases per year – even assert[ing] an Olech class-of-one equal-protection violation in federal court." Brief for the Petitioner, page 49.

Federal courts have considered and ruled upon equal protection class of one claims in the workplace for over thirty years. See, *e.g.*, *Trister v. University of Miss.*, 420 F.2d 499, 503 -504 (5th Cir. 1969); *Martin v. Harrah Ind. Sch. Dist.*, 579 F.2d 1192 (10th Cir. 1978), rev'd, *Harrah Ind. Sch. Dist.*

*v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979); *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981); *Ciechon v. City of Chicago*, 686 F.2d 511, 522-23 (7th Cir. 1982); *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717 (8th Cir. 1996). No empirical evidence has been cited by the *Engquist* majority or by the Respondents[2] in support of the notion that an abundance of such claims has deluged the courts. In fact, not one of the Circuits, including those with decades of experience, has bemoaned the administrative burdens attendant to permitting such claims.

What is more, a review of decisions in class-of-one employment cases does not evidence a "struggle. . .to define the contours of class-of-one cases" as suggested by the *Engquist* majority. 478 F.3d at 993. Rather, it reveals the articulation of clear and logical principles of law, rooted in well-settled constitutional jurisprudence, such that litigants know in advance whether or not their claims qualify for Constitutional protection. The *Engquist* majority's prediction of a flood of litigation is undercut by the acknowledgment that the various Circuits permitting such claims have developed judicially discernible and manageable standards, with the specific intent of confining the circumstances to which the theory can apply .

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[2] The Respondents' Brief in Opposition to Petition for Writ of Certiorari, page 15, undermines the notion of a barrage of *Olech*-based employment claims by noting that "there are many public employees, but almost no successful class-of-one public employee claims."

This Court has recognized that the issue of whether or not a cause of action may "open the floodgates to a host of unworthy suits" depends "not on the potential popularity of a claim that could be well defined," but whether "litigation [is] invited because the elements of a claim are so unclear that no one can tell in advance what claim might qualify or what might not." *Wilkie v. Robbins*, ___ U.S. ___, 127 S.Ct. 2588, 2604, 168 L.Ed.2d 389 (2007). As to class-of-one employment claims, the Circuit Courts have developed definite criteria that clearly circumscribe these claims. As articulated in *Olech, supra,* 528 U.S. at 564, a plaintiff must establish that (1) the government treated him or her differently from other similarly situated persons; see, *e.g., Nielsen v. D'Angelis*, 409 F.3d 100, 104-05 (2d Cir. 2005); *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002), citing *Indiana State Teachers Ass'n v. Bd. Of Scho. Comm'r*, 101 F.3d 1179, 1181-82 (1996) and *Hill v. Borough of Kitztown*, 455 F.3d 225, 239 (3rd Cir., 2006); (2) the difference in treatment was intentional; see, *e.g., Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) and *Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004); and (3) the difference in treatment was not rationally related to any legitimate government purpose. See *Whiting v. Univ. of S. Mississippi*, 451 F.3d 339, 348 (5th Cir. 2006); *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005) and *Squaw Valley v. Goldberg*, 375 F.3d 936, 944-47 (9th Cir. 2006).

The recognition of this cause of action has not been construed as an open invitation to litigate

every governmental employment decision. Indeed, the opposite is true. Due to the consistent refusal of the Circuit Courts to permit such actions to proceed in all but the most meritorious situations, there exists no incentive to bring questionable or spurious claims. What is more, civil rights plaintiffs who litigate under 42 U.S.C. Section 1983 are well aware that they can recover damages only upon proof that their "clearly established constitutional rights" have been violated, as official action is protected by qualified immunity unless its unlawfulness is apparent in light of pre-existing law. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Plaintiffs therefore have no incentive to bring equal protection claims which stretch the boundaries of existing law.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Baker v. Carr*, 369 U.S. 186, 208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). "The majority opinion [in Engquist], in the name of prudence, eviscerates the Constitution's promise of equal protection to all Americans." *Apache Bend Apartments, Ltd. v. United States*, 98 F.2d 1174, 1186 (5th Cir. 1993) (Goldberg, J., dissenting).

## CONCLUSION

For the foregoing reasons, in addition to those set forth in Petitioner's brief, the decision of the Ninth Circuit Court of Appeals must be reversed.

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February 26, 2008

# AMICUS CURIAE BRIEF

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SUPREME COURT, U.S.

# In the Supreme Court of the United States

ANUP ENGQUIST,

*Petitioner,*

v.

OREGON DEPARTMENT OF AGRICULTURE, ET AL.

*Respondents.*

## BRIEF OF *AMICUS CURIAE*, NATIONAL FRATERNAL ORDER OF POLICE, IN SUPPORT OF PETITIONER.

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## QUESTION PRESENTED

This case involves the issue of whether a public employee is entitled to the shield of the Equal Protection Clause of the United States Constitution on a "class-of-one" basis when her employer intentionally treats her differently than similarly situated employees with no rational basis and for arbitrary, vindictive or malicious reasons.

The National Fraternal Order of Police respectfully submits that a public employee should be provided the protection of the Equal Protection Clause and should be allowed to argue a class-of-one theory where she has been treated differently than similarly situated public employees without any rational basis and in an arbitrary, vindictive or malicious fashion.

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## BRIEF OF AMICUS CURIAE, FRATERNAL ORDER OF POLICE

Now comes the National Fraternal Order of Police, by and through undersigned counsel, and hereby respectfully submits its Brief in support of Petitioner urging reversal of the judgment of the United States Court of Appeals for the Ninth Circuit.

## INTEREST OF *AMICUS*[1]

With this Brief, the National Fraternal Order of Police ("FOP") submits the views of its more than 325,000 law enforcement members regarding the potential implications for officers in law enforcement that will result from the decision rendered by the Ninth Circuit Court of Appeals. The Brief will focus on:

1. The importance of protecting the constitutional rights of public employees and, more specifically, law enforcement officers; and

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[1] The submission of this Brief was consented to by all parties hereto.

The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.

2. The use of this case to establish a workable standard for the protection of the constitutional rights of public employees.

**STATEMENT.**

As succinctly stated by President Calvin Coolidge:

> The duties which a police officer owes to the State are of a most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it, everyone is obliged to live up to the standard of its requirements. To join in that high enterprise means the surrender of much individual freedom. The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from it until he is relieved. A great and honorable duty is his, to be greatly and honorably fulfilled.
>
> But there is toward the officer a corresponding duty of the State. It owes him a generous compensation for the perils he endures for the protection of society. It owes him the knowledge of security that is to be his, from want in his declining years. It owes him that

> measure which is due to the great importance of the duties he discharges.[2]

The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities. Law enforcement officers occupy a unique niche within the realm of public employment. Although police officers undeniably occupy the most dangerous and stressful positions in the public domain, police officers are afforded the least protection in regard to their own employment. Only 24 of the 50 States recognize the right of law enforcement officers to engage in binding collective bargaining with their employers. In addition, every State prohibits law enforcement officers from striking in regard to the terms and conditions of their employment.

The FOP perspective on the issues presented in this case is unique and particularly appropriate to the substantive issues presented by this case. Law enforcement personnel nationwide work every day to promote and ensure the safety of people everywhere. Yet it is this class of public employees that enjoys the least protection in regard to the security of their own employment. The Decision of the Ninth Circuit Court of Appeals further erodes the few constitutional protections enjoyed by law enforcement, society's front line of defense.

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[2] Calvin Coolidge, President of the United States, 1924.

As public servants, the members of the FOP have always recognized that the first and foremost duty of their profession is to serve society. In exchange for that commitment, law enforcement has only asked to be treated fairly by their governmental employer. In the words of past Grand FOP President, Michael L. Barrett:

> Back in 1915 . . . the 23 police officers who organized it [the FOP] no doubt had in mind the old Biblical saying 'Give to Ceasar the things that are Ceasar's and to God the things that are God's.' Therefore we, as public servants, if we give to the public the things that belong to the public, we have a right to ask for what belongs to us.[3]

It is with these interests in mind that the FOP and its membership respectfully request this Honorable Court to reverse the Decision of the Ninth Circuit Court of Appeals and find that public employees are entitled to constitutional protection from arbitrary, malicious or vindictive employment decisions.

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[3] Grand President's Report, *Minutes of the 11th Convention, Fraternal Order of Police, South Bend, Indiana* (August 17-19, 1927) p. 13.

## ARGUMENT.

### I. The United States Constitution Remains One of the Few Enduring Protections For Law Enforcement Officers Against Arbitrary and Capricious Governmental Employment Action.

> The essence of government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.
>
> James Madison, 1829.

According to the U.S. Department of Labor, Bureau of Labor Statistics, police officers and detectives held approximately 861,000 jobs in 2006. Of that number, 79% were employed by local governments, 11% were employed by state police agencies and 7% were employed by various federal agencies. The reality of these statistics is that the vast majority of law enforcement personnel are employed at the local level of government. These officers, in cities and towns across the United States, are ever vulnerable to the whim of local politics, the absence of standardized employment policies and procedures, and little statutory protection regarding the terms and conditions of their employment.

Only 24 States recognize the right of law enforcement officers to enter into binding collective

bargaining agreements with their employers.[4] In addition, officers who have the least protection from arbitrary or vindictive employment decisions are those who work in law enforcement agencies which are not subject to collective bargaining agreements and are not subject to Civil Service laws. In many cases, these law enforcement agencies are free to treat their employees however they choose, so long as they do so in compliance with the United States Constitution and other applicable federal laws. Even in those States which have Civil Service laws applicable to law enforcement, many such laws make the decisions of Civil Service Boards either completely unreviewable in court or excessively difficult to review.[5]

Another employment issue that uniquely affects law enforcement personnel is the continued blurring of the line between on-duty and off-duty conduct. Many municipalities currently have regulations regarding both the off-duty conduct of police officers and conduct

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[4] Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin.

[5] See, e.g., *Billings v. Civil Serv. Comm'n*, 154 W. Va. 688; 178 S.E.2d 801 (W. Va. 1971)("[a] final order of the Civil Service Commission based upon a finding of fact will not be reversed by this Court upon appeal unless it is clearly wrong."); *City of Detroit v. Detroit Lieutenants' and Sergeants' Assoc.*, No. 250424, 2005 WL 387647, (Mich. Ct. App. Feb. 17, 2005)(stating that even "silly" fact finding by an arbitrator must be upheld on review).

which is defined as "unbecoming" an officer.[6] The intense media scrutiny felt by police officers regarding even day-to-day job responsibilities as well as off-duty conduct results in political pressure for both the governmental employer and the officer.[7] Because of the higher standard to which police officers are held and the resulting political and media pressure which comes to bear, police officers are uniquely vulnerable to politically motivated, arbitrary and capricious employment action. As stated above, in many jurisdictions where officers have no binding collective bargaining rights and no civil service protection, constitutional rights claims may be the only recourse for aggrieved officers.

One of the first reported cases to recognize the cause of action for class-of-one equal protection in a public employment context is the case of *Chiechon v. City of Chicago.* In *Chiechon*, the plaintiff was a paramedic who worked for the defendant city. *Chiechon v. City of Chicago*, 686 F.2d 511, 513 (7th Cir. 1982). In the midst of "record-setting snow conditions as the result of a blizzard," Plaintiff Chiechon and a fellow paramedic responded to a call regarding a man having difficulty breathing. *Id.* at 513-14. Plaintiff

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[6] Thomas Martinelli, *Minimizing the Risk by Defining Off-Duty Police Misconduct,* The Police Chief, 2007, Vol. 74, pgs. 40-45.

[7] See, e.g., *Malec v. Vill. of Oak Brook*, No. 06 C 5167, 2007 U.S. Dist. LEXIS 36507 at *5 (N.D. Ill. May 18, 2007)(". . . police officials have always been subject to far more detailed scrutiny and reporting requirements than ordinary employees or government workers.")

Chiechon and her fellow paramedic urged the patient to "go to the hospital," but he refused. *Id.* After the paramedics had left, the patient died. *Id.* A few days after the patient's death, his family contacted several public officials as well as the news media regarding the incident. *Id.* at 515. The family complained regarding inadequate service of the paramedics, which prompted significant media attention and criticism of the city's administration. *Id.* Following intense media scrutiny, Plaintiff Chiechon was terminated as a paramedic. However, her fellow paramedic was not. *Id.* at 516. In holding the paramedic's termination violative of the Equal Protection Clause of the United States Constitution, the Seventh Circuit Court of Appeals stated as follows:

> In this case the family's grief was expressed in pointless vengeance and, in view of media and family pressure, the official investigation was single-mindedly and intentionally directed to ruining the career of one, but only one, of the four employees involved in this unfortunate incident. Because of these two factors, we have no difficulty in finding violations of procedural due process and equal protection. However, we have no intention of opening the floodgates to review all municipal personnel decisions. It is only because these defendants purposely and invidiously chose one of two similarly situated employees for undeserved punishment and misused otherwise legitimate disciplinary

> procedures that our intervention is justified.

*Id.* at 516-17 (citations omitted).

Unfortunately for police officers, critical and traumatic incidents involving the performance of their job duties many times end up receiving media scrutiny. This simply cannot be said for most other professions. One need only turn on the television, radio or peruse the internet to find dozens of stories regarding police officer involved shootings, incidents involving traffic stops, and claims of police brutality. With the media attention that accompanies critical police incidents involving the public, police officers are particularly vulnerable to the type of "scapegoating" which occurred in the *Chiechon* case. In jurisdictions that do not recognize collective bargaining or other state law based employment protections, the availability of a class-of- one equal protection claim is important to ensure that similarly situated public employees are treated comparably.

A current example of this type of "scapegoating" can be seen in the case of former Belmont County, Ohio, Sheriff Deputy Barbara Snyder.[8] Ms. Snyder began her employment with the Belmont County, Ohio, Sheriff's Department in 1996 as a part-time jailer and was promoted to Sergeant in 2000.

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[8] Sgt. Snyder's case is currently pending in the United States District Court for the Southern District of Ohio, Case No. 08cv111.

In early 2007, the FBI began to investigate the Belmont County Sheriff's Department regarding an allegation that departmental employees in the jail used excessive force on a former inmate. Specifically, the allegations consisted of "unwarranted and excessive tasering" of an inmate. The FBI investigation into the inmate's allegations led to intense media scrutiny. As a result, Sgt. Snyder, the supervisor of the shift accused of inmate abuse, as well as all other members of her shift were put on administrative leave. During the course of the FBI investigation, it was determined that Sgt. Snyder was not on duty on any of the dates or times that the inmate was alleging abuse. Sgt. Snyder was exonerated of all charges by the FBI investigation. Despite this fact, Sgt. Snyder was summarily terminated by the Belmont County Sheriff's Department in part because she was the supervisor of the shift accused of inmate abuse (even though she was not present and had no knowledge of any of the incidents) and because of the intense media attention regarding the allegations. However, Sheriff deputies who actually engaged in the alleged prisoner abuse were given the opportunity to either resign or retire, in lieu of being terminated. The Belmont County Sheriff was able to use Sgt. Snyder as a "scapegoat" to satisfy the public's and media's appetite for punishment, while allowing the deputies who had actually engaged in wrongful conduct to resign or retire without having a publicaly vetted termination on their records.

Luckily, Sgt. Snyder resides in a State that allows binding collective bargaining between police officers and their public employers, and has available to her a potential Title VII claim for gender

discrimination. However, a police officer who does not have such protections available to him or her, either by way of State collective bargaining or Civil Service laws, might not have any recourse for the clearly disparate and prejudicial treatment such as the example set forth above. This is exactly the type of governmental conduct, based upon whim and caprice, with no legitimate or rational basis, that the Equal Protection Clause of the United States Constitution is uniquely designed to prevent.

## II. The Standard for Articulating A Class-Of-One Equal Protection Claim Can Be Narrowly Drawn by This Court to Establish A Workable Standard for the Protection of the Constitutional Rights of Public Employees.

As pointed out by the Ninth Circuit, "Other Courts of Appeals have chosen to apply *Olech's* class-of-one theory to public employment decisions."[9] Some, but not all, of the courts applying this doctrine have limited the claims by requiring a showing of ill will or other animus as an element of the claim. *Engquist*, *supra* at 993. The FOP advocates a showing of intent

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[9] *Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007) citing *Scarabrough v. Morgan Cty. Bd. of Ed.*, 470 F.3d 250 (6th Cir. 2006); *Hill v. Borough of Kitz Town*, 455 F.3d 255 (3d Cir. 2006); *Whiting v. Univ. of Miss.*, 451 F.3d 339 (5th Cir. 2006); *Neilson v. D'Angelis*, 409 F.3d 100 (2d Cir. 2005); *Levenstein v. Salafsky*, 414 F.3d 767 (7th Cir. 2005); *Campagna v. Mass. Dep't Envtl. Prot.*, 334 F.3d 150 (1st Cir. 2003); *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143 (10th Cir. 2001).

for the purposes of analyzing the viability of a public employee's claim for class-of-one equal protection. Public employees enjoy all constitutional rights equally with all citizens of the United States, including equal protection. However, in the public employment context reasonable limits may be placed on these rights. The FOP is not advocating the "constitutionalization" of every aspect of the public employment relationship. Instead, aggrieved public employees, including police officers, should be allowed to state a class-of-one claim under the Equal Protection Clause where they have been treated differently than similarly situated co-employees in an arbitrary or capricious fashion that is motivated by animus or some other ill intent. Such a framework allows the discretion of public officials to make employment decisions without regular court interference and depriving public employees of the constitutional protections to which they, and all citizens of the United States, are entitled.

The notion of equal protection requires not that everyone be treated the same, but only that those similarly situated be treated similarly. This Court stated in the case of *Nordlinger v. Hahn*, "of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). In the public employment context, the FOP is not advocating for a constitutional review for every public employee who claims to have been aggrieved by a governmental employment decision. Instead, public employees should be provided

protection from arbitrary decisions motivated by impermissible rancor. As stated by the Seventh Circuit in the *Chiechon* case:

> Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way . . . This requires a showing that its application of the law 'rationally furthers some legitimate, articulated state purpose and therefore does not constitute invidious discrimination.' . . . This does not mean that error or mistake in the application of the law gives rise to an equal protection claim . . . rather, it protects against intentional invidious discrimination by the state against persons similarly situated.

*Chiechon*, 686 F.2d at 522-23 (citations omitted).

The FOP urges this Court to adopt a workable test based upon these constitutional principles. Specifically, public employees should be insulated from decisions by their governmental employer which treat similarly situated employees dissimilarly based upon an arbitrary or capricious decision that is motivated by rancor or other ill will. As has been outlined by the previous section in this Brief, police officers, as a unique group of public employees, are frequently subjected to outside pressures from the media and other groups which can result in employment decisions based upon political motivation or for the purposes of "scapegoating." With such a wide range of state-based

protections, or lack thereof, for police officers around the country, the endorsement by this Court of the viability of an equal protection claim, under the parameters as set forth herein, would protect police officers from the most invidious and malicious types of treatment.

In addition, such narrow tailoring for this type of claim would certainly address any concern that this Court's endorsement of a class-of- one equal protection claim for public employees would lead to an "avalanche" of federal court filings by aggrieved public employees. The FOP does not advocate federal court review of every employment decision. Instead, requiring a showing of ill intent should sufficiently limit such claims to only the most egregious situations.

In fact, an examination of the reported cases in federal circuits that currently recognize class-of-one equal protection claims demonstrates that such a cause of action has not been abused in the past. Such recognition has not led to a "flood" of equal protection claims in federal courts. In the past five years, the cases where public employees have articulated claims for class-of-one equal protection which resulted in reported decisions are as follows[10]:

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[10] The research done by counsel for *Amicus* FOP included reported cases within the Appellate Circuit, including District Court reported decisions.

| District & Appellate Courts | Cases |
|---|---|
| First Circuit: | 3 cases |
| Second Circuit: | 78 cases |
| Third Circuit: | 21 cases |
| Fifth Circuit: | 8 cases |
| Sixth Circuit: | 7 cases |
| Seventh Circuit: | 32 cases |
| Tenth Circuit: | 8 cases |

Even in the Appellate Circuits that have recognized class-of-one equal protection claims since the inception of *Olech*[11] in 2000, there certainly has not been a "flood" of cases involving this type of claim. For a larger picture, in the year 2000, alone, 21,032 cases were filed by plaintiffs in Federal Courts alleging civil rights complaints related to employment.[12] Based upon this empirical evidence, there is no reason to believe that the filing of class-of-one equal protection claims will significantly increase should this Court recognize the viability of such a claim. This is particularly the case if the Court adopts, as urged by the FOP, some sort of "intent" requirement for the maintenance of such a claim.

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[11] *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000).

[12] U.S. Department of Justice, Bureau of Justice Statistics, *"Civil Justice Data Brief,"* July 2002.

## CONCLUSION.

In the words of Winston Churchill, "We make a living by what we get. We make a life by what we give." These words spoken about the sacrifice that so many made during the Second World War are very appropriate for describing those individuals who have chosen to serve society in law enforcement. The public employees who risk their lives every day to enforce the laws of the United States should be entitled to protection under the very laws they are sworn to uphold. This Court has an opportunity to craft a standard by which public employees may bring class-of-one equal protection claims while still maintaining the managerial rights of governmental employers.

Based upon the foregoing, the National Fraternal Order of Police respectfully requests this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit and hold that public employees are entitled to bring class-of-one claims under the Equal Protection Clause.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 07-474

IN THE

*SUPREME COURT OF THE UNITED STATES*

ANUP ENGQUIST,
*Petitioner*

v.

OREGON DEPARTMENT OF AGRICULTURE, ET AL.
*Respondents*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

# BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. The NSBA federation represents the nation's 95,000 school board members, who, in turn, govern approximately 15,000 local school districts. These school districts employ over 6 million teachers[2] and another approximately 6 million non-certificated staff, including paraprofessionals, custodians and other building maintenance personnel, school psychologists and social workers, bus drivers, and food service workers. Taken as a whole, public school districts are the nation's single largest government employer.[3] NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the obligation of public schools to promote the efficiency of the public

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[1] This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

[2] U.S. Census Bureau, Census 2000 Special Employment Opportunity Tabulation, *available at*, http://www.census.gov/hhes/www/eeoindex/page c.html?

[3] In comparison, as of January 1, 2003 1.4 million people were on active duty in the U.S. military with an additional 1.3 million people in the National Guard and Reserves. U.S. Census Bureau, Facts for Features – U.S. Armed Forces and Veterans, *available at*, http://www.census.gov/Press-Release/www/2003/cb03-ff04se.html.

education system, and the private interests of employees affected by governmental action.

NSBA submits this brief to emphasize the significant adverse impact that overturning the Ninth Circuit's decision in *Engquist v. Oregon Department of Agriculture* would have on the operation of our nation's schools.

## SUMMARY OF THE CASE

Anup Engquist was an employee of the Oregon Department of Agriculture (ODA) who, during the course of her employment, experienced repeated difficulties with Joseph Hyatt, another ODA employee. Hyatt was disciplined for his behavior by then-Director of ODA Laboratory Services, Norma Corristan. Hyatt eventually drafted a plan for the Assistant Director of the entire ODA, John Szczepanski, to reorganize the Export Service Center (ESC), a laboratory of the ODA in which Engquist worked. Assistant Director Szczepanski had made it known that he could not "control" Engquist, and Hyatt told a co-worker that he and the Assistant Director were working to "get rid of" Engquist.

Ultimately, Hyatt was promoted by Szczepanski, over Engquist who also applied for the position, to manage the ESC. Shortly thereafter, the Governor of Oregon called for budget reductions in state departments, and the Director of ODA Laboratory Services (Corristan) position was eliminated by Szczepanski. A few months thereafter, Engquist was informed by Hyatt that her position also was being eliminated, due to

reorganization. She was offered, pursuant to her collective bargaining agreement, the opportunity to "bump" into another position, but there was no position open at her level for which she was qualified, and thus she was laid off. Engquist sued the Oregon Department of Agriculture, claiming, in pertinent part, that as a "class of one" her equal protection rights had been violated. This claim proceeded to a jury trial, and the jury concluded that Defendants were liable for violations of equal protection and substantive due process. The United States Court of Appeals for the Ninth Circuit reversed, holding that the class-of-one theory was not applicable to decisions made by public employees.

## SUMMARY OF THE ARGUMENT

The Ninth Circuit and the United States Court of Appeals for the Seventh Circuit are the only two circuits to analyze the "class of one" theory in the context of state and local public employment in any depth. Both Circuits have concluded that, unless constrained, the "class of one" remedial theory of equal protection could provide a federal cause of action for review of almost every state or local governmental personnel decision. This is in keeping with this Court's longstanding warning that the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. *See Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). In the context of our nation's 15,000 school districts, which employ approximately 12 million people nationwide, this Court should not create a new

"class of one" remedy, placing itself in the position of a super personnel department sitting in judgment of every personnel decision of those 12 million school employees nationwide.

A new judicial remedy in the realm of public employment law is unnecessary. If this Court endorses these "class of one" equal protection claims for every disgruntled public school employee aggrieved by employment disciplinary action taken against him or her, then it will effectively override the multitude of already-existing protections held by the 12 million largely-unionized school employees that has been carefully constructed by lawmakers and contractual negotiations to achieve a balance between worker rights and an efficient education system. The effect upon school districts across the nation of making every disciplinary act, whether it resulted in termination or not, into a prima facie constitutional equal protection case would be chilling, and a waste of precious time and money. Rendering a system that already is challenged for resources to educate children needlessly less efficient and less safe is simply unwise and unnecessary policy.

The "class of one" theory is a judicial remedy that is only appropriate in the context of public employment law if it is needed to address a wrong that would otherwise go unredressed. It arose in the context of government acting as "sovereign," and treating citizens differently by requiring different easements from property owners identically situated. While this Court has fashioned a variety of non-statutory remedies for violations of the Constitution by federal and state officials, when it has faced the question of whether it should augment

an already-elaborate remedial system for aggrieved government employees with a new judicial remedy for a constitutional violation, as is the instant case, it has drawn the line. *See Bush v. Lucas*, 462 U.S. 367 (1983). Having already firmly declined to create a new substantive legal liability when a federal governmental employee was improperly disciplined, this Court should follow its own precedent in the instant case.

This Court has regularly drawn a distinction between governmental entities acting in their role as "sovereign" as compared to governmental actions in the dispatch of internal affairs. *See Connick v. Meyers*, 461 U.S. 138 (1983); *Waters v. Churchill*, 511 U.S. 661 (1994); *Arnett v. Kennedy*, 416 U.S. 134 (1974). There is a clear delineation between the government operating as a regulator, licensor, or lawmaker as compared with the government acting as proprietor, managing internal operations. In addition, because state and federal governments do not constitutionally have the complete freedom of action enjoyed by private employers, in exchange the Court has limited the rights of public employees as compared to ordinary citizens, instituting a balance between when the employee is acting as an employee versus a citizen. *See Pickering v. Board of Educ.*, 391 U.S. 563 (1968). *See also Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The Ninth Circuit has properly concluded that the "class of one" theory of equal protection has no place in the public employment setting. This Court does not want to become a super personnel department, there is no need for this new remedy, and governmental entities have long been accorded the leeway to efficiently and effectively manage

their internal affairs. NSBA urges this Court to affirm the decision of the Ninth Circuit.

## ARGUMENT

### I. The policy decision before this Court is whether federal courts will become super personnel departments, responsible for addressing every grievance made by school district employees across the country.

This Court has recognized that the federal courts should not become super personnel departments through the creation of a new remedial equal protection theory when extensive remedies already exist and the government appropriately has wide latitude in making personnel decisions when acting as an employer. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error." *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976). Just as this Court found, in *Bishop*, that the Due Process clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions, so too should it find that the "class of one" remedy is not an appropriate application of Equal Protection in the school district employment context. The Court, in *Bishop*, further considered the fact that by implication, to do otherwise leads to

the conclusion that almost every discharge of an employee gives rise to a constitutionally protected interest. 426 U.S. at 350 n.14.

The public policy argument against extending the "class of one" remedy to school district employment decisions is decisive here. Putting the yoke of "class of one" onto every individual governmental employer internal personnel action essentially gives any teacher aggrieved by an employment decision a prima facie equal protection case in federal court, opening endless new vistas of unwarranted liability to school districts. The specific remedy of "class of one" would extend most disciplinary cases past both a motion to dismiss and a motion for summary judgment. In terms of a motion to dismiss, the very fact that a teacher was disciplined, while his or her peers were not, would ostensibly create alleged differing treatment of similarly situated teachers. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. Pro. 8(a)(2). While this standard still "requires more than labels and conclusions," and "a formulaic recitation of a cause of action's elements will not do," the factual allegations simply must "be enough to raise a right to relief above the speculative level . . . on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1964-65 (2007). Similarly, it is hard to imagine a case that would not contain at least some genuine issue of material fact, such that summary

judgment would not be warranted and the case would proceed to trial.

It is easy to imagine the limitless avenues for federal claims based on the literally millions of employment decisions made by school districts throughout the United States every day. The personnel decisions that a school district employee could challenge are endless. If the Ninth Circuit is reversed, every time a school district fires, demotes, denies tenure, transfers teachers, etc., the employment decision would be subject to this new "class of one" remedial theory. As Judge Posner recognized, an unbridled "class-of-one" remedial theory opens "endless vistas of federal liability". *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005). Many such cases would come to federal court "dressed as" constitutional cases. 424 F.3d at 632.

A case of unequal treatment by a supervisor is remarkably easy to invent, as Judge Posner also pointed out in *Lauth v. McCollum*, *supra*. Even without application of "class of one" to the school employment setting, the problem of disgruntled teachers interjecting federal constitutional issues into what are primarily personal disputes already occurs all too often. For example, in *Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988), a teacher filed suit under 42 U.S.C. § 1983 alleging violation of his Fourteenth Amendment rights in connection with the termination of his employment as a public high school teacher. Vukadinovich was a teacher of industrial arts, for which he did not have permanent certification,[4] and he also coached

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[4] When he was hired, Vukadinovich was not licensed to teach industrial arts. The school obtained a limited teaching license

basketball. *Vukadinovich*, 853 F.2d at 1388. He resigned as a basketball coach, and in a local newspaper article was quoted with comments to the effect that he had been asked to step down as coach and didn't think it was fair. *Id.* Soon after the article, he received notice that his teaching contract was to be cancelled due to his lack of a proper certificate. *Id.* at 1389. Vukadinovich sued, claiming in part that he was treated differently than other uncertified teachers in retaliation for the exercise of his First Amendment rights. *Id.* In other words, he did not dispute that he could have been fired simply because he was uncertified; but instead claimed that he was selected for termination, while other uncertified teachers were not, because he exercised his right to free speech. *Id.* The Seventh Circuit noted that:

> Although in a sense any events which transpire in a public school are matters of public concern, we have recently quoted *Connick* as stating, "'To presume that all matters which transpire within a government office are of public concern would

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for him, allowing him to teach industrial arts until he could complete the courses required for certification, on the basis that they certified "an emergency need for personnel in the teaching area," as required by Indiana regulation. However, Vukadinovich never did what was needed to obtain a permanent certification to teach industrial arts.

> mean that virtually every remark ... would plant the seed of a constitutional case.'"

*Id.* at 1390, (*citing Hesse v. Board of Educ.*, 848 F.2d 748, 752 (7th Cir. 1988) (*quoting Connick*, 461 U.S. at 149)). The Seventh Circuit found Vukadinovich's speech unprotected, and thus, found that his § 1983 claim failed. 853 F.2d at 1391. The Seventh Circuit reached its decision in 1988, but the outset of Vukadinovich's litigation commenced in 1981. *Id.* at 1389.

When teachers are permitted to transform what are essentially personal disputes with employers into constitutional claims, not only is the waste of time and money on litigation tremendous, but student achievement and welfare may be compromised. School districts must be able to swiftly and effectively discipline or terminate employees who put student education or safety at risk by failing to execute their responsibilities in the manner prescribed by the school board and state lawmakers. They must be able to do so without undue fear of Fourteenth Amendment claims based solely upon the "dissimilar" treatment a single employee may allege when his or her peers "similarly situated" by the very fact that they are also employees of the school district are not disciplined in what the employee perceives to be the same manner for alleged similar employee misconduct.

Courts have long recognized the authority of schools to control the policies, rules, and regulations governing employment of teachers and staff. Given

the vulnerability of young students in the care of schools for multiple hours every day and the heightened accountability standards for student performance that have been imposed in the last five years,[5] it is especially critical that school boards retain control over the employee disciplinary process. All public school districts in the country are answerable to taxpayers and to the federal government, who are increasingly holding them responsible for the academic performance of their students in myriad ways. Every state has passed some form of performance-based accountability—setting the standards for content to be taught in the classroom, conducting state-wide testing, setting targets for student learning, and critically, putting sanctions in place if student outcomes are not meeting expectations. Performance-based accountability is also the centerpiece of No Child Left Behind, which connects millions of dollars in public school federal funding to student outcomes, and severely sanctions schools and districts who fail to meet the federally-required improvement on tests. This entire new era of accountability is based upon the premise that school districts and their administrators are capable of not only monitoring student performance, but of making decisive managerial decisions about resources, responsibilities and structures that are connected to performance. Nothing could be closer to student performance than teacher performance. Implementing changes in teacher responsibilities and promptly correcting and/or sanctioning teachers

[5] *See* No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.* (2008).

who are unwilling or unable to meet the heightened expectations of today's classroom is imperative.

Courts have long recognized the authority of schools to control their policies, rules, and regulations governing employment of teachers and staff. *See, e.g., Milliken v. Bradley*, 418 U.S. 717 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.") The educational mission is of such crucial importance that Justice Frankfurter noted that one of the four "essential freedoms" of a public educational institution was "to determine for itself on academic grounds *who* may teach...." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added).

This Court's precedents simply do not support the existence of a constitutional cause of action behind every action a public employee makes in the course of doing his or her job. The Fourteenth Amendment ought not be used to effectively make every instance of managerial discipline into a federal equal protection case. When any unexplained or unjustified disparity of treatment by a school employee or school board is deemed a prima facie denial of equal protection, limitless claims of federal liability are possible. Regardless of whether or not such cases can be regularly won is beside the point. Engquist's proposed contrary rule in the instant case would commit state and federal courts to a new, permanent and intrusive role, mandating additional and unnecessary judicial oversight of the daily decisions of over 95,000 school board members.

## II. This Court has refused to create a new judicial equal protection remedy in the realm of federal public employment law.

### A. This Court pays heed to "special factors counseling hesitation" before creating a new judicial remedy.

Creating a "class of one" equal protection claim for every disgruntled public school employee aggrieved by an employment action would unnecessarily add a new judicial remedy to the multitude of already-existing remedies held by the 12 million largely-unionized public school employees in the United States. These remedies were carefully constructed by lawmakers, as well as by public employers and unions through contractual negotiations, to achieve a balance between worker rights and an efficient education system. In creating a new judicial remedy, the Court must be cognizant of these already-existing remedies. *See Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush v. Lucas*, the Court held that it would not create a new judicial remedy for federal public employees as it would be "inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Id.* at 368.

Of particular importance here, the Court acknowledged that it must pay "particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* at 377. The "special factors counseling hesitation" do not go to the merits of the new remedy, but instead focus on the "question of who should decide whether

such a new remedy should be provided." *Id.* at 380. The Court made clear that

> [t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for

> violations of employees' [constitutional rights].

*Id.* at 388.

### B. The "special factors counseling hesitation" here include more than the numerous measures examined in *Bush* but also the measures adopted by federal, state, and local governments to protect the rights of employees of school districts.

Federal, state, and local governments have adopted various measures to protect employees from employers who would commit unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws; labor codes; and for virtually every teacher in the United States, statutory protections which provide specific due process rights concerning notice and opportunity to be heard before the school board that is recommending discipline, non-renewal or termination of the teacher's contract.[6] Finally, two-thirds of all states have collective bargaining statutes covering teachers and mandating that local school districts bargain over the terms and

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[6] *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http://www.ecs.org/clearinghouse/75/64/7564.doc, which delineates statutes in every state in the United States that provide certain job protections and due process considerations for teachers.

conditions of employment.[7] These protections serve to make an additional cause of action for alleged equal protection violations based on the "class of one" concept simply unnecessary.

In terms of substantive rights granted by statute, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions usually framed as "just cause." Typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. Procedurally, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* David M. Pedersen, "Statutory Dismissal of School Employees," Termination of School Employees: Legal Issues and Techniques §§ 10-1, 10-2 (National School Boards Association 1997). During such hearings a teacher would be able to raise the claim that the school board has no "just cause" to terminate him or her when other similarly situated employees were not removed for substantially the same conduct. Moreover, all states allow teachers

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[7] Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in statutes. *See* Education Commission of the States, Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm. Typically these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures.

to appeal the school board's decisions to some entity—for example, a state court, a tenure commission, or a state board of education. *See* Education Commission of the States, footnote 6, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*[8]

In addition to the statutory rights and remedies discussed above, the federal government has created other additional remedies. These include: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (prohibits employment discrimination based on, race, color, religion, sex, and national origin); the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (prohibits employment discrimination against qualified individuals with disabilities); the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (protects individuals who are 40 years of age or older); and the Equal Pay Act, 29 U.S.C. § 206(d) *et seq.* (protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination). The United States Equal Employment Opportunity Commission (EEOC), established by Congress, enforces all of these laws.[9] And, of course, Congress has provided private rights of action pursuant to 42 U.S.C. §§

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[8] Overlying this are federal laws that mandate certification and qualifications of teachers in order to receive federal funds. *See* No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.* (2008).

[9] For fiscal year 2007, the EEOC handled 82,792 complaints. Nearly 43,000 of those complaints resulted in a No Reasonable Cause finding. U.S. Equal Employment Opportunity Commission, Table, All Statutes FY 1997-FY 2007, *available at*, http://www.eeoc.gov/stats/all.html.

1981 and 1983. Finally, this Court would create quite a paradox by announcing a new federal constitutional remedy to school teachers that Congress itself has specifically chosen to avoid. *See Lauth*, 424 F.3d at 633 (noting that it would not "inject the federal courts into an area of labor relations that Congress disclaimed a federal interest in.").[10]

This Court should not tamper with these extensive and carefully constructed measures. These special factors counsel against the creation of the new judicial remedy of "class of one" for public employees. Given Congress' reluctance and the panoply of federal, state, and local laws and regulations protecting employees of school districts, there is, quite simply, "no gap in legal protections to justify dragging in equal protection concepts designed for entirely different situations." *Id.* at 633. As Judge Posner cogently explained, "when as in this case the unequal treatment arises out of the employment relation, the case for federal judicial intervention in the name of equal protection is especially thin." *Id.*

Given all the protections discussed above, the case for a new judicial remedy here is not just thin, it evaporates. Petitioner herself brought claims under Title VII, 42 U.S.C. § 1981, equal protection, procedural and substantive due process, and intentional interference with contract. *Engquist*, 478 F.2d at 991. However, she did not avail herself of a claim under 42 U.S.C. § 1983 or of remedies

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[10] The National Labor Relations Act does not apply to state or municipal employees. 29 U.S.C. §152(2) (2008). *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977).

through her collective bargaining agreement. *Id.* at 995 n.5. As such, there is no gap in legal protections to warrant the creation of a new judicial remedy to supplement the already-existing remedies created by federal, state, and local governments, as well as clearly established constitutional rights.

## III. This Court has always treated the government as employer differently than the government as sovereign, and thus school districts as employers must be treated differently.

### A. The need for constitutional limitations on the government when acting as employer is substantially less than when the government is acting as sovereign.

This Court has long recognized the distinction between the government acting as employer, managing its own internal affairs, and the government acting as sovereign, attempting to legislate, regulate, or license. "[T]he government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994). *See also Healy v. James*, 408 U.S. 169, 201 (1972) (Rehnquist, J., concurring) (stating that the government in its capacity as employer differs constitutionally from the government in its capacity as the sovereign executing laws). However, when the government acts in its sovereign capacity, "it reaches out to deal with, direct, or regulate the conduct of the citizen; in

some instances against the will of the citizen, and often in interference with the citizen's own property or contract rights." *U.S. v. General Petroleum Corp. of Cal.*, 73 F.Supp. 225, 250 (D. Cal. 1946). When this occurs, "the law requires strict boundaries around the exercise of power." *Id.* at 250.

When the Government acts as an employer, it "must have wide discretion and control over the management of its personnel and internal affairs." *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974). As this Court recently observed in *Garcetti v. Ceballos*, *supra*, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." 547 U.S. at 418. This is because, without such control, "there would be little chance for the efficient provision of public services." *Id.* The Court thus emphasized "affording government employers sufficient discretion to manage their operations" and discouraged "[the] displacement of managerial discretion by judicial supervision." *Id.* at 422-23.

In addition, it is a long-settled principle that governmental actions are subject to a lower level of constitutional scrutiny when the operative governmental function is not the power to regulate or license, as lawmaker, but, rather, as proprietor, to manage its internal operations. *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (*citing Cafeteria & Restaurant Workers v. McElroy Local 473, AFL-CIO*, 367 U.S. 886, 896 (1961) (quotations omitted)). "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be

subject." *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). In other words, the restrictions that the Constitution places upon the government in its capacity as employer are not the same as the restrictions that it places upon the government as sovereign. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting). The Court has "recognized this in many contexts, with respect to many different constitutional guarantees." *Rutan*, 497 U.S. at 94 (Scalia, J., dissenting).[11]

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[11] Notably, this Court has also recognized that constitutional protections need not be as strong outside the government as employer context. For example, in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998), the Court considered whether a provision of the National Foundation on the Arts and the Humanities Act violated the First and Fifth Amendments. The statute, 20 U.S.C. § 954(d)(1) (2008), required the Chairperson of the National Endowment for the Arts to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Finley*, 524 U.S. at 572. The Court determined that the Act was not unconstitutionally vague even though "the terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns." 524 U.S. at 588. The Court observed, "We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Id.* at 589. The court noted that "[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government

Moreover, the Court has cautioned against "constitionaliz[ing] the employee grievance." *See Connick v. Meyers*, 461 U.S. 138, 154 (1983). In *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968), the Court adopted a balancing test between the interests of a public employee (there, a teacher), as a citizen, in commenting upon matters of public concern and the interests of the State (there, a school district), as an employer, in promoting the efficiency of the public services it performs through its employees. The Court noted that it was indisputable that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568.

### B. This Court has repeatedly limited the scope of constitutional protections afforded to public employees in light of the government's need to carry out its mission effectively and efficiently.

"Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner." *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987) (plurality opinion). "[I]n many cases, public employees are entrusted with tremendous responsibility." *Id.* at 724. As such, they have "a direct and overriding interest in

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programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.'" *Id.*

ensuring that the work of the agency is conducted in a proper and efficient manner." *Id.*

In light of the government's need to carry out its mission effectively and efficiently, this Court has repeatedly limited the scope of constitutional protections afforded to public employees. For example, in *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, *supra*, the Court limited due process protections because of the government's need to maintain security in military operations. 367 U.S. at 896. Noting the government's interest in the "dispatch of its own internal affairs," the Court asserted that the "Fifth Amendment does not require a trial-type hearing in every conceivable case" and that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 894-95 (quotations omitted). The Court observed:

> [T]he governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment.

*Id.* at 896.

This Court likewise limited the scope of due process protections afforded public employees in *Kelley v. Johnson*, 425 U.S. 238 (1976), because of the governmental interest of the county police department. There, the Court upheld a department regulation which established hair-grooming standards for male members of the police force, despite an officer's argument that the regulation infringed upon his liberty interest. *Id.* at 239. The Court noted that the officer "sought the protection of the Fourteenth Amendment, not as a member of the citizenry at large, but on the contrary as an employee of the police department," and this distinction was "highly significant." *Id.* at 244-45.

In addition, the Court has widely limited the scope of public employees' First Amendment protections. In *Connick v. Meyers*, the Court held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147. The Court noted that "government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. The Court warned that "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case." *Id.* at 149.

Similarly, in *Waters v. Churchill, supra*, the Court observed that "not every procedure that may safeguard protected speech is constitutionally mandated." 511 U.S. at 670. There, the Court examined "[w]hat it is about the government's role as employer that gives it a freer hand in regulating the speech of its employees rather than it has in regulating the speech of the public at large." *Id.* at 671. The Court opined that "the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id.* at 674-75. The Court thus declared:

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the

> public at large just in the name of efficiency. But where the government is employing someone for the very purpose of achieving its goals, such restrictions may well be appropriate.

*Id.* at 675. The Court maintained that "where the government is acting as employer, its efficiency concerns should . . . be assigned a greater value." *Id.*

Likewise, in *Garcetti v. Ceballos*, *supra*, this Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. The Court reasoned in part that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen" and instead "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

### C. This Court has recognized that wide latitude is necessary for public employers, and this is particularly true for public school districts, given the special characteristics of the school environment.

In *Arnett v. Kennedy, supra*, this Court noted that "[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." 416 U.S. at 168. As such, "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." *Id.* at 168. When the government actor is a public school district, such as one of the 15,000 school districts represented by the Amicus here, its interests are heightened all the more. Public schools have a "legitimate need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-340 (1985) (holding that school officials need not obtain a warrant before searching a student who is under their authority). "In a public school environment . . . the State is responsible for maintaining discipline, health, and safety." *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 830 (2002).

This Court has repeatedly recognized the "special characteristics of the school environment," most notably in discussing the rights of students. *See Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007), *citing Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). For example, in *Morse v. Frederick*, the Court determined that "the governmental interest in stopping student drug abuse . . . allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use." 127 S.Ct. at 2629. The Court rightly noted that "[s]chool principals have a difficult job, and a vitally important one." *Id.* at

2629. As such, when a student "suddenly and unexpectedly unfurled [a] banner" which read "Bong Hits 4 Jesus," and the principal "had to decide to act—or not act—on the spot," the Court maintained the principal acted reasonably in concluding that the banner promoted illegal drug use and disciplining the student accordingly. *Id.*

The "special characteristics of the school environment" which attend the rights of students also affect school districts as public employers. When a citizen is working as a public employee, the constitutional rights that employee enjoys are circumscribed by the very nature of that employment. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. This Court's policy has been "'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor*, 480 U.S. at 722, *citing Connick*, 461 U.S. at 143. Just as this Court has found that certain school employee speech is not protected by the First Amendment, so too should this court find that certain school employee behavior is not protected by the Fourteenth Amendment under a "class of one" remedy. "Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently." *Connick*, 461 U.S. at 143.

## CONCLUSION

The Ninth Circuit's decision has properly concluded that the "class of one" theory of equal protection has no place in the public employment setting. The existing statutory and regulatory structure already put in place by Congress and every state in the United States needs no new judicial remedy for a constitutional violation. There is a clear distinction between governmental entities acting in their role as "sovereign" as compared to governmental actions in the dispatch of internal affairs. The very reason that governmental entities are held to different standards than private entities is to assure that public employees' rights as citizens are protected. This Court has repeatedly held that the rights of a public employee when acting not as a citizen, but as an employee, may and must be abrogated in order to balance the needs of public entities to effectively manage their internal affairs. The line of First Amendment cases is very instructive. If, instead, the Ninth Circuit is overturned and a new judicial "class of one" equal protection remedy is created for every disgruntled public school employee aggrieved by employment disciplinary action taken against him or her, this will effectively override the multitude of already-existing protections held by our nation's 12 million school employees, protections which have been carefully crafted to achieve an appropriate balance between worker rights and an efficient education system. It will lead to the commitment of substantial additional amounts of time and money by already-strapped school districts that need to spend their limited resources on the education of

students, not additional litigation, when ample school district employee protections already exist. For these reasons, amicus NSBA urges this Court to uphold the Ninth Circuit.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 07-474

# In the Supreme Court of the United States

ANUP ENGQUIST,
*Petitioner*

*v.*

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,
*Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF THE STATES OF PENNSYLVANIA, FLORIDA, HAWAII, ILLINOIS, IOWA, MONTANA, NEVADA, OHIO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WYOMING, AND THE COMMONWEALTH OF PUERTO RICO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICI*

The question before the Court is "whether traditional equal protection 'rational basis' analysis under *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), applies to public employers who intentionally treat similarly situated employees differently with no rational basis for arbitrary, vindictive or malicious reasons." The States are among the Nation's largest public employers and therefore have a substantial interest in the resolution of this question. In addition, state officers and employees are frequently the targets of equal protection claims brought pursuant to 42 U.S.C. § 1983. The *amici* therefore also have a substantial interest in seeing that "class of one" equal protection claims actually are constrained within the bounds of "traditional" rational basis analysis.

## SUMMARY OF ARGUMENT

I. It is well settled that the federal courts are not the appropriate forum for reviewing the personnel decisions of governmental agencies, and that government could not function if every personnel decision planted the seed of a constitutional case. The Court has therefore long rejected readings of constitutional provisions that would have the effect of constitutionalizing the employee grievance.

The version of rational basis analysis advanced by petitioner and adopted by the District Court in this case, however, would have precisely that effect. As a practical matter, that theory permits a jury to find an equal protection violation whenever the jury is

convinced that a personnel action is not supported by good cause; and its focus on decision-makers' subjective intent encourages burdensome and intrusive discovery while ensuring that few claims can be disposed of short of trial. The result is an intrusive level of judicial oversight which is inconsistent both with a regard for the proper limits of the judicial function and with sound principles of federalism.

These considerations alone should suffice for the Court to reject petitioner's "class of one" theory. But that theory, as applied in this case, is also at odds with the Court's well-settled principles of rational basis analysis under the Equal Protection Clause.

II. The Court's rational basis standard of review is highly deferential to the decisions made by the political branches, and this deference in turn is rooted in respect for the separation of powers and for concerns of federalism. Under this standard, absent a suspect classification or the infringement of a fundamental constitutional right, a governmental decision must be upheld if there is any reasonably conceivable state of facts that can support it.

The decision-maker's subjective motive for its actions is constitutionally irrelevant; if there is a plausible reason for the government's action, the inquiry is over. Moreover, a court may not resolve conflicts in the evidence against the government's decision; if the facts to support that decision are arguable, then by definition a rational basis for the decision exists. It therefore follows that the existence of a rational basis presents a question of law, not of

fact, to which issues of the decision-maker's "animus" or other subjective motive are irrelevant.

III. Viewed against this standard, it is apparent that the District Court's treatment of petitioner's claim veered dramatically away from this Court's "traditional" principles of rational basis analysis. The District Court refused to accept the more than plausible explanation advanced by respondents for petitioner's termination on the ground that the evidence on that point was in conflict. Instead, the District Court permitted this case to go to a jury on the issue of respondents' subjective motives for terminating petitioner, and in particular whether they were "really" motivated by malice or spite.

None of this comports with the Court's long-settled, "traditional" principles of rational basis analysis. The Court should reject this departure, and should make it clear that, if public employees are to be permitted to pursue "class of one" claims at all, those claims must be resolved in accordance with the same "traditional" principles that apply to all other claims.

## ARGUMENT

### I. "Class-Of-One" Equal Protection Theory, As Misconceived By The Courts Below, Threatens The Effective Functioning Of Government By "Constitutionalizing The Employee Grievance."

The Court has long rejected the idea that public employees may be required to surrender constitutional rights as a condition of their

employment. *E.g.*, *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). But the Court has also consistently recognized that "government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143 (1983). "[P]ublic employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner," *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987) (plurality opinion); and "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

Accordingly, the Court has consistently refused to adopt a view of any constitutional provision that would "constitutionalize the employee grievance." *Id.*, at 154. *See, e.g.*, *Garcetti, supra* (First Amendment); *Ortega, supra* (Fourth Amendment); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (substantive due process); *Bishop v. Wood*, 426 U.S. 341 (1976) (Fourteenth Amendment liberty interest). The Court has instead adhered to the view that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.*, at 349. While "numerous individual mistakes are inevitable in the day-to-day administration of our affairs[,] [t]he United States Constitution cannot feasibly be construed to require federal judicial review for every such error. ...[W]e must presume that official action was regular and, if erroneous, can best be corrected in other ways." *Id.*, at 350.

The Court of Appeals correctly saw that the "class of one" theory, as advanced by petitioner and applied

by the District Court in this case, is incompatible with these well-settled views. As the Court of Appeals recognized, 478 F.3d at 995, by imposing a *de facto* requirement that respondents convince a jury that good cause existed for petitioner's termination, the District Court effectively constitutionalized tenure for all employees and did away with any notion of at-will employment in the public sector. This result cannot be reconciled with the Court's long-standing view of the nature of public employment, *see Collins*, 503 U.S. at 128 ("state law, rather than the Federal Constitution, generally governs the substance of the employment relationship"); *Bishop*, 426 U.S. at 350 n. 1 ("the ultimate control of state personnel relationships is ... with the States; they may grant or withhold tenure at their unfettered discretion"), and would overturn long-standing personnel practices in virtually every State.[1]

The Court of Appeals was also correct to observe that there is no principled basis upon which to limit such claims to terminations: "other employment actions, such as promotions, disciplinary actions, and decisions about pay, benefits and transfers," 478 F.3d at 995, would all likewise be subject to federal court review on a claim that an employee had been singled out for vindictive or malicious treatment. Even everyday supervisory decisions on such matters as scheduling and assignments, and everyday

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[1] Most States have both tenured and at-will employees. The specifics vary widely from State to State, but the most usual practice is to cover some employees under some kind of merit protection system, while exempting other employees – typically, agency heads and other high-level managers, immediate aides to such employees, professional employees such as attorneys, and employees of the judicial and legislative branches – from coverage. *See* Appendix A to this brief.

conversations with employees, could be strung together to become the grist for a hostile work environment claim based on the same theory. The federal courts would thus indeed become the "forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop*, 426 U.S. at 349.

The inclusion of an "arbitrary, malicious or vindictive" motive as an element of such a claim only makes matters worse. "Because an official's state of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El v. Britton*, 523 U.S. 574, 584-585 (1998). In addition, open-ended allegations of malice subject governmental defendants to wide-ranging discovery that is both burdensome and disruptive to effective government. *Ibid.* "Class-of-one" equal protection theory, then, as conceived and applied in this case, threatens to impair the independence of the political branches even as it turns the federal courts into super-civil service review boards.

Ironically, these additional burdens would be incurred in the cause of providing additional protection to those workers who are least in need of it. Public employees, like private-sector employees, are of course already protected by federal statutes such as Title VII against discrimination based on race, religion, sex or other protected traits. In addition, millions of public employees in every State are protected by merit selection and retention systems; and millions more are covered by collective bargaining

agreements.[2] Appendix A to this brief gives a state-by-state breakdown of such protections.[3] In light of this, the observation that "official action ... if erroneous, can best be corrected in other ways" has lost none of its cogency since the Court first made it in *Bishop*. *See Garcetti*, 547 U.S. at 425 (noting existence of legislative protections for public employees).

All of these considerations counsel in favor of the Court of Appeals' categorical rule that public employees simply may not bring "class of one" challenges to personnel decisions. The Court of Appeals could see no other way to constrain such claims within reasonable bounds, and as we have just discussed, there is much to support that view. But it is also true that many of these adverse effects flow directly from the District Court's fundamental misunderstanding of the "rational basis" analysis required by this Court's equal protection decisions – a misunderstanding not corrected, and thus apparently

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[2] The Department of Labor reports that about 40% of public employees are represented by a union. By contrast, only about 8% of private-sector workers are unionized. *See* U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, *Union Members in 2007*, Table 3 (Jan. 2008), available at http://stats.bls.gov/news.release/union2.t03.htm (visited Feb. 25, 2008).

[3] In addition to the state statutory protections summarized in Appendix A, federal law requires States to adopt merit personnel standards for certain employees as a condition of participating in many federal-state programs, such as the Medicaid program established by Title XIX of the Social Security Act. *See* 42 U.S.C. § 1396a(a)(4). A complete list of such programs is found at App. A to 5 C.F.R. Pt. 900, Subpt. F (2007) (standards for merit system of personnel administration). These merit standards need not be embodied in a state statute. *See* 5 C.F.R. § 900.604 (compliance) (2007).

shared, by the Court of Appeals. By the same token, many of these adverse effects could be minimized, if not eliminated, by a proper understanding and rigorous application of the correct principles of such an analysis. To that subject we now turn.

## II. Under The Rational Basis Analysis Developed By This Court, A Public Employee's Challenge To A Personnel Decision Should Only Rarely Proceed To Trial And Only Rarely Succeed.

### A. The Court's rational basis jurisprudence mandates a standard of review that is highly deferential to the decisions of the political branches.

The Court has repeatedly emphasized that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of [governmental] choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Rational basis review, as developed in the Court's equal protection decisions, is instead "a paradigm of judicial restraint." *Id.*, at 314. Absent the involvement of a suspect class or the infringement of a fundamental constitutional right, a governmental classification must be upheld "if there is any reasonably conceivable state of facts" that can support it. *Id.*, at 313. "Where there are 'plausible reasons'" for a governmental action, a court's inquiry is "'at an end.'" *Id.*, at 313-314, *quoting United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1981).

Whether these "plausible reasons" in fact underlay the governmental decision is "constitutionally irrelevant." *Fritz*, 449 U.S. at 179 (internal quotation

marks omitted). Nor is the governmental decision-maker obliged to produce empirical evidence to support its decision. *Vance v. Bradley*, 440 U.S. 93, 110-111 (1979). A decision may be based on "rational speculation unsupported by evidence or empirical data," and "those attacking the rationality of the ... classification have the burden 'to negative every conceivable basis which might support it.'" *Beach Communications*, 508 U.S. at 315, *quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

A governmental decision challenged as lacking a rational basis is thus "not subject to courtroom fact-finding." *Beach Communications*, 508 U.S. at 315. "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength," *Vance*, 440 U.S. at 112, *quoting Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916), for "the District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the [governmental] judgment...." *Vance*, 440 U.S. at 111 (internal quotation marks omitted). If "the facts are arguable," that very circumstance "immunizes" the decision from constitutional attack under rational basis review. *Id.*, at 112.

As the Court said in *Beach Communications*, "these restraints on judicial review have added force" where decision-makers "must necessarily engage in a process of line-drawing," because such decisions "inevitably require[] that some persons who have an almost equally strong claim ... be placed on different sides of the line." Perfection in such matters is not required: "[i]f [a] classification has some reasonable

basis, it does not offend the Constitution simply because [it] is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (internal quotation marks omitted). That a line "might well have been drawn differently" is simply not a matter for judicial consideration. *Beach Communications*, 508 U.S. at 316 (internal quotation marks omitted).

This highly deferential standard of review is rooted in concerns for the separation of powers and the proper limits on the judicial function. "Only by faithful adherence to this guiding principle of judicial review is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.*, at 315 (internal quotation marks omitted). Many of the Court's equal protection cases, like *Beach Communications*, have concerned classifications established by legislative rather than executive or administrative action. But this makes no difference to the standard of review. *See Nordlinger v. Hahn*, 505 U.S. 1, 15-17 & n. 8 (1992) (same standard of review governs equal protection challenges to administrative and legislative decisions).[4] The Court has recognized, in the related context of selective prosecution, that the executive branch too is entitled to deference in carrying out its constitutional functions. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996) (deference "stems from a concern not

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[4] Petitioner herself argues at length that equal protection challenges stand on the same footing regardless of whether they are directed at legislative or executive decisions. *See* Br. for Pet. 17-19. Indeed, if this were not so, she would have no equal protection claim at all.

to unnecessarily impair the performance of a core executive constitutional function"); *Wayte v. United States*, 470 U.S. 598, 607-608 (1985). In the case of state officers, these separation-of-powers concerns are reinforced by considerations of federalism. *See Garcetti*, 547 U.S. at 423 (rejecting a rule that would have committed the courts to a "new, permanent and intrusive role ... between ... government employees and their superiors", as "inconsistent with sound principles of federalism and separation of powers").

### B. The rational basis inquiry presents a question of law, not of fact, to which the actual motive of the decision-maker is irrelevant.

From this discussion, several things are clear. First, whether a given decision is rationally related to a legitimate governmental interest presents a question of law for a court, not a question of fact for a jury. While the Court does not seem ever to have expressed this principle in so many words, the courts of appeals which have directly addressed this issue, whether in the context of equal protection or the closely related context of substantive due process, have uniformly so concluded. *See, e.g., Myers v. County of Orange*, 157 F.3d 66, 74-75 & n. 3 (2d Cir. 1998); *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 172 (5th Cir. 1996); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3d Cir. 1991), *overruled on other grounds, United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 410 (3d Cir. 2003); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 471 (1st Cir. 1990). Indeed, this conclusion follows unavoidably from the Court's repeated admonition that the rational basis

inquiry does not involve fact-finding. *See Beach Communications*, 508 U.S. at 315; *Vance*, 440 U.S. at 111.

Second, and closely related to the first point, the issue of the decision-maker's subjective reasons for acting – and particularly whether those reasons can be described as "malicious" or "arbitrary" or "vindictive" – has no place in the rational basis inquiry. The Court has repeatedly held that what actually motivated a decision-maker "is entirely irrelevant for constitutional purposes." *Beach Communications*, 508 U.S. at 315; *Fritz*, 449 U.S. at 179 ("constitutionally irrelevant" what reasoning in fact underlay a decision). In *Garrett v. Bd. of Trustees of Univ. of Alabama*, 531 U.S. 356, 367 (2001), the Court made it clear that ill intent – what the Court called "negative attitudes" and what petitioner calls "animus" – is neither a necessary nor a sufficient condition for a successful constitutional challenge. "Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make." *Ibid.*

While an inquiry into subjective motive is thus obviously inconsistent with the Court's long-settled equal protection doctrine as a general matter, there are additional reasons not to import such an inquiry into the specific context of employment disputes. Submitting such an issue to a jury inevitably – as it did here – transforms the proceedings into a civil service-like inquiry into good cause, or a Title VII-like inquiry into pretext, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) – a course which cannot be reconciled with the Court's settled doctrine that the

Equal Protection Clause does not empower the courts to second-guess state officials charged with difficult responsibilities. *Dandridge*, 397 U.S. at 487; *Beach Communications*, 508 U.S. at 313 (not a license to judge the "wisdom, fairness or logic" of governmental decisions). This second-guessing is particularly likely when a jury is asked to evaluate personnel decisions, which may well turn on subjective assessments – as of the relative merits of two or more employees – ill-suited for formal proof in an adversarial setting.

Moreover, as the Court said in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it is clear that "substantial costs attend the litigation of the subjective good faith of government officials." Questions of subjective intent

> rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. at 816-817. These considerations apply with special force in the context of employment-related disputes, where an open-ended search for proof of "animus" is apt to lead to a re-hashing of every petty disagreement in the workplace, further damaging working relationships and "disrupt[ing] effective government." Just as the Court in *Harlow* rejected subjective intent as an element of the qualified

immunity defense, the Court should reject it in this context as well.

Instead, the Court should adhere to its holding that the only question in a rational basis inquiry – in this as in other contexts – is whether there are "plausible reasons" to support the governmental action, *whether or not* those reasons in fact underlay the decision. *See supra* at 8-9. In the context of personnel decisions, the answer to that question will almost always be "yes."

There may well be no "plausible reason" – no "conceivable set of facts" – why one homeowner should have to convey to her municipality an easement twice as large as every other owner in order to get water service, *see Olech*, 528 U.S. at 565; and there may well be no "conceivable set of facts" why one taxpayer should pay taxes at thirty-five times rate paid by others, *see Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 341 (1989). But it is neither inconceivable nor implausible – indeed, it is the universal experience – to believe that one employee is less hardworking, or productive, or cooperative, or open to new ideas, or is a less valuable employee in any one of a hundred other ways, than another employee. And it is certainly not irrational to believe that some legitimate end – productivity, morale, discipline, efficiency – will be furthered if that employee is terminated, reassigned, transferred, demoted or disciplined.

In pursuing this rational basis inquiry, courts should not engage in fact-finding, and should not weigh conflicting evidence on the correctness or fairness or wisdom of the government employer's

action. If the facts on which the decision-maker could have relied are "arguable," then by definition the inquiry is at an end. *Vance*, 440 U.S. at 112; *Beach Communications*, 508 U.S. at 315 (decisions may be based on "rational speculation"). Nor should a court attempt to divine the "real" reason for the government's action, which is "constitutionally irrelevant." *Fritz*, 449 U.S. at 179. Only if there exists no "plausible reason" which could conceivably support the government's decision does that decision fail rational basis analysis.

It is apparent, given this highly deferential standard of review, that few if any claims of this kind should ever be submitted to a jury,[5] and few should succeed whether they are submitted to a jury or not. We turn finally to the question of how these principles of "traditional equal protection 'rational basis' analysis," Pet. i, were applied – or, to be more precise, were not applied – in this case.

## III. The Lower Courts In This Case Fundamentally Misconceived The Nature Of Rational Basis Analysis.

It is ironic that, in her petition for certiorari, petitioner invoked the principles of "traditional ... rational basis analysis," and asked the Court to decide whether those "traditional" principles apply to disputes over the personnel decisions of public

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[5] While the existence of a rational basis would always remain a question of law for the court, it is of course possible that some cases might present questions of historical fact for a jury to resolve – for example, whether a plaintiff was in fact treated differently from other employees.

employers. Pet. i. Ironic, because it should be clear by now that the treatment of petitioner's claim in the courts below strayed as far from "traditional ... rational basis analysis" as may well be imagined.

The District Court ignored the holdings of this Court that a governmental decision survives rational basis analysis where there are "plausible reasons" that support it. *Beach Communications*, 508 U.S. at 313. In this case, respondents explained that petitioner's position was eliminated for budgetary reasons. The State of Oregon faced a significant revenue shortfall for the 2001-2003 budget; the governor called for budget cuts and asked that agencies eliminate or restructure programs to accomplish this. J.A. 19; 478 F.3d at 991. Eliminating petitioner's position could rationally be expected to help. That she may have been as deserving of keeping her job as other employees, or even more so, was neither here nor there. A line needed to be drawn to balance the budget, and it need not have been drawn perfectly. *Dandridge*, 397 U.S. at 485 (classification not unconstitutional simply because not made with mathematical nicety). Clearly, respondents offered a "plausible reason" to support their decision.

Under "traditional" rational basis analysis, that should have ended the case, but it did not, because the District Court also ignored this Court's holdings that a district court's responsibility for making findings of fact "does not authorize it to resolve conflicts in the evidence against the [governmental] judgment." *Vance*, 440 U.S. at 111 (internal quotation marks omitted). The existence of evidence that called into question whether budgetary savings would actually be realized should have made no difference, as this is

precisely the kind of factual conflict that courts are not to resolve in conducting rational basis analysis. If the facts are "arguable," as they obviously were here, the challenged classification must be upheld. *Vance*, 440 U.S. at 112. Nevertheless, the District Court twice denied respondents' motions for summary judgment on the ground that

> [t]here is evidence that plaintiff performed her job satisfactorily and that her termination was not the result of "reorganization' or budgetary costs. Based on this same evidence, there are genuine issues of fact as to whether plaintiff was singled out as a result of animosity . . . thereby violating her equal protection rights.

J.A. 59; *see also* J.A. 42.

Finally, the District Court ignored this Court's holdings that a decision-maker's actual motive is "constitutionally irrelevant" to the rational basis inquiry. *Fritz*, 449 U.S. at 179. Instead, the District Court permitted the question of respondents' ill intent to become the central issue of the case – an issue which was ultimately submitted to the jury. In her brief to this Court, petitioner now attempts to downplay the role of this issue, *see* Br. for Pet. 42-45, but this cannot obscure the fact that allegations of the respondents' "animus" were an essential part of her claim. The District Court specifically held that for petitioner to prevail, "she must show that she was singled out *as a result of animosity* on the part of Hyatt and Szczepanski. To do so, she must show that their actions were *spiteful efforts to punish her....*" J.A. 58 (emphases added). The District then went on to deny respondents' motion for summary judgment

on the ground that this very issue remained in dispute. J.A. 59 ("there are genuine issues of fact as to whether plaintiff was singled out *as a result of animosity*...") (emphasis added).

At trial, the District Court then invited the jury to decide whether petitioner's termination was really the result of budget cuts, or whether she was singled out as a result of animosity on the part of the defendants. J.A. 62-64. In short, the treatment of petitioner's claim in the courts below had more in common with a garden variety civil service hearing, than with the principles of "traditional" rational basis analysis long settled by the Court.

The Court may well conclude, as did the Court of Appeals, that the difficulties which attend this type of claim on the part of public employees justify a categorical rule against the federal courts entertaining them. But if these claims are to be entertained at all, at the very least the Court should make it clear that the "traditional" principles of rational basis analysis must be rigorously applied to such claims, and should disavow the path staked out by the lower courts in this case.

## CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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March 26, 2008

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# APPENDIX A

| State | Merit System Protection | At-Will Employment | Collective Bargaining |
|---|---|---|---|
| Alabama | Yes. Ala. Code §§ 36-26-1 *et seq.* | Yes. Ala. Code § 36-26-10 | No. |
| Alaska | Yes. AS 39.25.010-.995 | Yes. AS 39.25.010-.995 | Yes. AS 23.40.070 *et seq.* |
| Arizona | Yes. Ariz. Rev. Stat. § 41-783. | Yes. Ariz. Rev. Stat. § 41-771 | No. |
| Arkansas | No. | Yes. | No. |
| California | Yes. Cal Const. Art. 7 § 1 | Yes. Cal. Const. Art. 7 § 4 | Yes. Cal. Govt. Code §§ 3512 *et seq.* |
| Colorado | Yes. Colo. Const. Art. 12, § 13 | Yes. Colo. Const. Art. 12, § 13 | Yes. 4 CCR 801, Board Rule 1-18 |
| Connecticut | Yes. Conn. Gen. Stat. § 5-193 *et seq.* | Yes. Conn. Gen. Stat. § 5-198 | Yes. Conn. Gen. Stat. § 5-270 *et seq.* |

| State | Merit System Protection | At-Will Employment | Collective Bargaining |
|---|---|---|---|
| Delaware | Yes. 29 Del. C. § 5901 *et seq.* | Yes. 29 Del. C. § 5903 | Yes. 19 Del. C. 1311A |
| Florida | Yes. Fla. Stats. § 110.201 *et seq.* | Yes. Fla. Stats. § 110.201 | Yes. Fla. Stats. § 447.201 *et seq.* |
| Georgia | Yes. O.C.G.A. § 45-20-1 *et seq.* (employees hired before FY 1996 only) | Yes. (All employees hired after FY 1995.) | No. |
| Hawaii | Yes. HRS 76-1 *et seq.* | Yes. HRS 76-16 | Yes. HRS 89-3. |
| Idaho | Yes. IC 67-5301 *et seq.* | Yes. IC 67-5303 | No. |
| Illinois | Yes. 20 ILCS 415/1 | Yes. 20 ILCS 415/4c | Yes. 5 ILCS 315/1 *et seq.* |
| Indiana | Yes. IC 4- | Yes. IC 4- | Yes. IC 20- |

| State | Merit System Protection | At-Will Employment | Collective Bargaining |
|---|---|---|---|
| | 15-2-1 *et seq.* | 15-2-7 | 7.5-1-1 to 20-7.5-1-14 |
| Iowa | Yes. ICA 8A.411 *et seq.* | Yes. ICA 8A.412 | Yes. ICA 20.8 |
| Kansas | Yes. KSA 75-2929a *et seq.* | Yes. KSA 75-2935 | Yes. KSA 75-4327 |
| Kentucky | Yes. KRS 18A.005 *et seq.* | Yes. KRS 18A.115 | No. |
| Louisiana | Yes. La. Const. Art. X | Yes. La. Const. Art. X, § 2 | No. |
| Maine | Yes. 5 MRSA chs. 65, 67-69, 71, 372 | Yes. 5 MRSA 7051(7) | Yes. 26 MRSA 979-B |
| Maryland | Yes. MD Code, State Personnel and Pensions, Div. I, Tit. | Yes. MD Code, State Personnel and Pensions, 11-305 | Yes. MD State Personnel and Pensions, Div. I, Tit. 3 |

| State | Merit System Protection | At-Will Employment | Collective Bargaining |
|---|---|---|---|
| | 1-15 | | |
| Massachusetts | Yes. MGL ch. 31 | Yes. MGL ch. 31 § 41 | Yes. MGL ch. 150A § 3 |
| Michigan | Yes. Mich. Const. Art. XI, § 5 | Yes. Mich. Const. Art. XI, § 5 | Yes. Mich. CSR 6-1.2 |
| Minnesota | Yes. MSA 43A.01 *et seq.* | Yes. MSA 43A.08 | Yes. MSA 43A.18 |
| Mississippi | Yes. Miss. Code Ann. 25-9-101, *et seq.* | Yes. Miss. Code Ann. 25-9-107(c) | No. |
| Missouri | Yes. VAMS 36.010 *et seq.* | Yes. VAMS 36.030 | Yes. VAMS 105.510-105.530 |
| Montana | Yes. Mont. Code Ann. § 2-18-101 *et seq.* | Yes. Mont. Code Ann. § 2-18-103 | Yes. Mont. Code Ann. § 39-31-101 *et seq.* |
| Nebraska | Yes. NRS § 81-1321 | Yes. NRS § 81-1321 | Yes. NRS § 81-1369 |

| State | Merit System Protection | At-Will Employment | Collective Bargaining |
|---|---|---|---|
| Nevada | Yes. NRS 284.150 | Yes. NRS 284.143 | No. NRS 288.110(2) |
| New Hampshire | No. | Yes. | Yes. NH Rev. Stat. 273-A1 – A179 |
| New Jersey | Yes. NJSA 11A:1-1 to 11A:12-6 | Yes. NJSA 11A:3-4 | Yes. NJSA 34:13A-1 to 34:13A-13 |
| New Mexico | Yes. NMSA 1978, 10-9-1 *et seq.* | Yes. NMSA 1978, 10-9-4 | Yes. NMSA 1978, 10-7E-1 to 10-7E-26 |
| New York | Yes. NY Civil Service Law, § 1 *et seq.*I | Yes. NY Civil Service Law, §§ 35, 41 | Yes. NY Civil Service Law 204 |
| North Carolina | Yes. NC Gen. Stat. § 126-34.1 | Yes. NC Gen. Stat. § 126-35, 126-1.1 | No. |
| North Dakota | Yes. NDCC 34-11.1 | Yes. | Yes. NDCC 34-12-04 |

| State | Merit System Protection | At-Will Employment | Collective Bargaining |
|---|---|---|---|
| Ohio | Yes. Ohio Rev. Code 124.33-124.341 | Yes. Ohio Rev. Code 124.11 | Yes. Ohio Rev. Code 4117.01-4117.23 |
| Oklahoma | Yes. 74 Okla. Stat. §§ 840-4.1, 840-4.2 | Yes. 74 Okla. Stat. §§ 840-5.1.A, 840-5.5 | No. |
| Oregon | Yes. ORS 240.005 *et seq.* | Yes. ORS 240.200, 240.205 | Yes. ORS 243.650 *et seq.* |
| Pennsylvania | Yes. Pa. Stat. Ann. tit. 71, § 741.1 *et seq.* | Yes. Pa. Stat. Ann. tit. 71, § 741.3 | Yes. Pa. Stat. Ann. tit. 43, § 1101.1 *et seq.* |
| Rhode Island | Yes. R.I. Gen. Laws 36-4-1 *et seq.* | Yes. R.I. Gen. Laws 36-4-2, 36-4-2.1 | Yes. R.I. Gen. Laws 36-11-1 *et seq.* |
| South Carolina | Yes. SC Code 8-17-310 *et seq.* | Yes. SC Code 8-17-370 | No. |

| State | Merit System Protection | At-Will Employment | Collective Bargaining |
|---|---|---|---|
| South Dakota | Yes. SDCL 3-6A-1 *et seq.* | Yes. SDCL 3-6A-13 | Yes. SDCL 3-18-1 *et seq.* |
| Tennessee | Yes. Tenn. Code Ann. 8-30-101 | Yes. Tenn. Code Ann. 8-30-101(a)(23) | No. |
| Texas | Yes. VTCA § 655.001 *et seq.* | Yes. VTCA § 655.001 | No. VTCA, Govt. Code 617.002 |
| Utah | Yes. Utah Code § 67-19-1 *et seq.* | Yes. Utah Code § 67-19-15 | No. |
| Vermont | No. | Yes. 3 VSA 258 | Yes. 3 VSA 901-1007 |
| Virginia | Yes. Va. Code Ann. 2.2-2900 *et seq.* | Yes. Va. Code Ann. 2.2-2905 | No. Va. Code Ann. 40.1-57.2 |
| Washington | Yes. Wash. Rev. Code 41.06.010 *et seq.* | Yes. Wash Rev. Code 41.06.170 | Yes. Wash. Rev. Code 41.56 |

# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

ANUP ENGQUIST,

*Petitioner,*

*v.*

OREGON DEPARTMENT OF AGRICULTURE, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* MEIR J. WESTREICH IN SUPPORT OF PETITIONER; OF REVERSAL OF JUDGMENT ON CLASS OF ONE RATIONAL BASIS EQUAL PROTECTION VERDICT

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## INTEREST OF *AMICUS CURIAE*[1]

The parties to this action consent to the filing of all amicus briefs submitted herein. This brief is submitted by undersigned with the following interests: (a) undersigned civil rights firm is currently prosecuting an action substantially similar hereto and arguably involving "class-of-one" equal protection public employment claims, *Carleton v. County of Los Angeles*, C.D.Cal. Case No. CV06-1655DSF; (b) undersigned has long litigated 42 U.S.C. § 1983 rational basis equal protection claims dating to when the theory was first recognized, *see Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984) (undersigned as appellant's counsel), and seeks to preserve same; and (c) undersigned has been litigating appeals seeking to apply the underlying constitutional text model as discussed herein.

This brief is desirable and will aid in the disposition of this case because it poses an alternative view of the standards which can be applied to § 1983 public employment rational basis equal protection claims which preserves the rights of public employees to pursue such claims while addressing the public policy concerns expressed in the Ninth Circuit Opinion under review herein; and proposes adoption of an analytic model that has currency in the Supreme Court – the underlying constitutional text model.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

## I.

## SUMMARY OF ARGUMENT

The holding subject to this Court's grant of *certiorari* bars all "class-of-one" rational basis equal protection claims in the public employment context, based on asserted public policy concerns for workplace efficiency, *see Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 993-96 (9th Cir. 2007), *cert. granted*, __ U.S. __ (2008), precluding this entire class of claims otherwise permitted by the Supreme Court and Ninth Circuit in actions outside of an employment context, *see Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (and cases cited therein); *Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 955 (9th Cir. 2006); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 944-46 (9th Cir. 2004).

This concern has caused other circuits to adopt special tests for public employee rational basis equal protection claims. *See, e.g., Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005) (requiring proof that differentially treated classes are otherwise "identical in all respects"); *Neilson v. D'Angelis*, 409 F.3d 100, 104 & n.3 (2d Cir. 2005) (requiring greater proof of similarity between compared classes); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004) (noting circuits which require added malice or ill will element).

In so doing, these circuits have made a classification under which the fundamental right to petition the federal courts under 42 U.S.C. § 1983, or otherwise, for redress of a constitutional grievance, *See Cruz v. Beto*, 405 U.S.

319, 321 (1972); *California Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) – *i.e.* class-of-one rational basis equal protection claims – is being barred or restricted for public employees. Such classifications, even when made by federal courts which are also bound by the First Amendment, *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15, 103-104 (1981); *cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980) (state court), and Fifth Amendment equal protection, *see Davis v. Passmen*, 442 U.S. 228, 248-49 (1979); *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948), must satisfy the strict scrutiny standard, with its least restrictive means test and presumption against its validity, *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 64-65, 69-70 (1981). This classification is unnecessary under existing standards for rational basis equal protection claims, with the attendant discriminatory intent requirement. *See* Discussion, Section IV.B, *infra* (and cases cited therein). Other circuits have adopted this view of public employee class-of-one rational basis equal protection claims. *See Scarborough v. Morgan County Board of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 348-49 & n.3 (5th Cir. 2006); *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005). Moreover, this Court – to date – has uniformly rejected any requirements for resort to state law or forum remedies or exhaustion requirements for claims pursued under 42 U.S.C. § 1983. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Patsy v. Board of Regents*, 457 U.S. 496, 501-506, 513-514, 516 (1982); *Monroe v. Pape*, 365 U.S. 167, 174-84 (1961).

To the extent that any special pleading or proof requirements are required and constitutionally permissible, there are less intrusive approaches that render unconstitutional the absolute bar under *Engquist*. The policy concerns of the *Engquist* holding, if not met by traditional rational basis equal protection analysis, can be met by existing First Amendment jurisprudence, which balances public employee speech rights, *see San Diego v. Roe*, 543 U.S. 77, 82 (2004); *Pickering v. Board of Education*, 391 U.S. 563 571-75 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), and the public interest in workplace efficiency, *see Connick v. Myers*, 461 U.S. 138, 142-44, 147-49 (1983); *Pickering*, 391 U.S. at 568, 571-75; *Mt. Healthy City Board of Education. v. Doyle*, 429 U.S. 274, 284-87 (1977), which includes the public interest in redressing unlawful discrimination, *see Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979).

## II.

## THE DIVISION AMONG CIRCUITS OVER WHETHER TO DIFFERENTIALLY TREAT CLASS-OF-ONE RATIONAL BASIS EQUAL PROTECTION CLAIMS ARISING FROM THE PUBLIC WORKPLACE HAS CULMINATED WITH THE 9TH CIRCUIT'S TOTAL BAN IN *ENGQUIST*

The Supreme Court has held that in the application of the rational basis standard of the equal protection clause, it applies with equal force to a "class-of-one" as with any other class of greater size. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (and cases cited therein). In so doing, the Court raised policy concerns that the practical effect can be to impose federal judicial review of virtually all government acts which

distinguish one person or from another person or group, especially in the public workplace. *See Village of Willowbrook*, 528 U.S. at 565-66 (J. Breyer, concurring); *Lauth v. McCollum*, 424 F.3d 631, 633-34 (7th Cir. 2005); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210-11 & n.4 (10th Cir. 2004). *See generally Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1209-10 (10th Cir. 2006) (discussing circuit divergence on this issue).

Some Circuits have sought to remedy this by adopting standards which treat public employee class-of-one claims differently from all other class-of-one claims, grafting various additional restrictive elements not otherwise contained in traditional rational basis equal protection analysus. *See, e.g., Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005) (requiring proof that differentially treated classes are otherwise "identical in all respects"); *Neilson v. D'Angelis*, 409 F.3d 100, 104 & n.3 (2d Cir. 2005) (requiring greater proof of similarity between compared classes); *Jennings*, 383 F.3d at 1211 (noting circuits which require added malice or ill will element). At least three (3) circuits – the Fifth, Sixth and a divided Seventh – have simply applied the highly restrictive objective standard of the equal protection rational basis standard as discussed in Section IV.B, *infra*. *See Scarborough v. Morgan County Board of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 348-49 & n.3 (5th Cir. 2006); *Lauth*, 424 F.3d at 634[2].

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2. Two other circuits – First & Third – invoked standard equal protection analysis, but with little discussion beyond the specific facts of the case. *See Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3rd Cir. 2006); *Campagna v. Massachusetts Dept. of Environmental Protection*, 334 F.3d 150, 156 (1st Cir. 2003).

The latest proffered remedy is the Ninth Circuit *Engquist* holding, subject to this *certiorari* order, which also treats public employee class-of-one rational basis equal protection claims differently than all other such claims, and bars without exception all "class-of-one" rational basis equal protection § 1983 claims in public employment. *See Engquist*, 485 F.3d at 994-96. While more extreme in its application, this rule joins those other circuits in treating such public employee claims, as a class, differently than other classes of such claims.

## III.

## RATIONALES FOR HOLDINGS WHICH LIMIT PUBLIC EMPLOYEE SPEECH RIGHTS DO NOT LOGICALLY JUSTIFY A BAR OF ALL PUBLIC EMPLOYEE FEDERAL LITIGATION OF ANY FORM OF RATIONAL BASIS EQUAL PROTECTION CLAIMS UNDER 42 U.S.C. § 1983

### A. Courts Are Governed By First Amendment Protections Of Free Speech And Petition, Including Access To Federal Courts

The protections of the First Amendment against governmental infringement of rights to free speech and to petition the government for redress of grievances apply equally to federal courts. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15, 103-104 (1981) (noting 1st Amendment applies to federal court, but reserves scope of application). *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980) (applying 1st Amendment to state court action). So too does the Fourteenth Amendment's equal protection clause apply

to actions by courts. *See Davis v. Passmen*, 442 U.S. 228, 248-49 (1979) (re implicit equal protection component of 5th Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948) (equal protection against state court enforcement of discrimination by private parties). The First Amendment's petition clause secures the right to petition federal and other courts for redress of grievances. *See Cruz v. Beto*, 405 U.S. 319, 321 (1972); *California Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

### B. Restrictions And Classifications Regarding Protected Speech And Petition Are Subject To Strict Scrutiny By Federal Courts

Governmental restrictions and regulations of rights secured by the First Amendment are subject to the most rigorous scrutiny by courts, with a heavy burden of proof on state actors, normally barring content-based restrictions or future expression and only permitting reasonable time, place and manner restrictions by least restrictive means. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 64-65, 69-70 (1981). The First Amendment secures unpopular or even disruptive speech as part of the open discourse that benefits a democratic and free society. *See City of Houston v. Hill*, 482 U.S. 451, 462-64, 467-69 (1987); *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976).

Likewise, any classification based on activity protected by the First Amendment is subject to the strict scrutiny test under the equal protection clause, *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985), with *inter alia* its least restrictive

means standard, *see City of Cleburne*, 473 U.S. at 439-42, and the presumption against its validity, *see Schad*, 452 U.S. at 64-65, 69-70.

The *Engquist* holding expressly provides a judicial classification impacting free speech and petition rights otherwise secured by the First Amendment. It provides a complete bar to public employees from seeking a judicial remedy of even the most meritorious class-of-one rational basis claim which would otherwise be available under existing rational basis equal protection jurisprudence. Assessment of this classification should thus be subject to the most rigorous standards of strict scrutiny under the First Amendment and Equal Protection Clause of the Fourteenth Amendment.

### C. Public Employee First Amendment Rights Are Subject To Greater Regulation Not Complete Prohibition

The Supreme Court actually once started from an historic premise that public employee free speech rights are not secured under the First Amendment, only to reverse field in *Pickering v. Board of Education*, 391 U.S. 563, 568, 571-75 (1968). *See Connick v. Myers*, 461 U.S. 138, 142-44, 147-49 (1983). The Supreme Court has since largely confined those rights of public employees to matters of public concern, *Connick*, 461 U.S. at 142, 147-49, complaints of legally forbidden discrimination, *see Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979), and to matters outside the scope of the employee's duties, *see Garcetti v. Ceballos*, 164 L.Ed.2d 689, 701-703 (2006). The Court also imposed a bifurcated, shifting burden of proof when adverse public

employment decisions are based on both forbidden First Amendment motivations and permissible employer reasons. *See Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 284-87 (1977).

But the scope of protected public employee speech remains substantial as public employees do not lose all free speech rights because they accept public employment. *See San Diego v. Roe*, 543 U.S. 77, 82 (2004); *Pickering*, 391 U.S. at 568, 571-75; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). These limited restrictions and regulations of public employee speech under the First Amendment must be viewed against the backdrop of speech rights in other contexts. In imposing these public employee speech restrictions and regulations, the courts have merely limited otherwise very broad rights; they have not barred public employee rights altogether. *See Garcetti*, 164 L.Ed.2d at 701-703; *Connick*, 461 U.S. at 142-44, 147-49; *Pickering*, 391 U.S. at 568, 571-73.

### D. The Ninth Circuit's Complete Bar In *Engquist* Of Public Employee Class-Of-One Rational Basis Claims Is Not Supportable Under Any Constitutional Analysis

Constitutional protection for rational basis equal protection claims are highly restrictive in their broadest applications. *See* Discussion, Section IV.B, *infra*. Attempts to limit or prohibit remedies for such conduct in employment settings are thus starting from a most restrictive foundation. Still, the *Engquist* holding would bar all such employee claims, not merely further restrict them, as proposed by three Circuits – the Second, a

divided Seventh and Tenth – *see Levenstein*, 414 F.3d at 775-76 (requiring proof that disparately treated classes are "identical in all respects"); *Neilson*, 409 F.3d at 104 & n.3 (requiring greater similarity between disparately treated classes than normal standard); *Jennings*, 383 F.3d at 1211 (adding subjective malice or ill will element to rational basis analysis).

As noted by the *Engquist* holding, *see Engquist*, 485 F.3d at 994-95, the Supreme Court in *Bishop v. Wood*, 426 U.S. 341, 349 (1976) expressed a similar fear from broad application of the due process clause in government personnel settings. But the quoted language was immediately followed by the declaration that this justified strictly restricting such claims to remedying constitutional deprivations, not prohibiting such claims or remedies. *See Bishop*, 426 U.S. at 350.

In barring public employee § 1983 class-of-one rational basis equal protection claims, the *Engquist* holding completely prohibits a First Amendment right of public employees – *i.e.* to seek federal judicial relief, *see e.g. Cruz*, 405 U.S. at 321; *California Transport Co.*, 404 U.S. at 510; *NAACP v. Button*, 371 U.S. 415, 429, 431 n.20 (1963) – in this instance for alleged intentional discriminatory acts otherwise barred by law under the equal protection rational basis test. Likewise, the *Engquist* holding on its face distinguishes between a "class-of-one" and all other size classes – if that distinction then holds up – in restricting access to the federal courts for securing remedies for equal protection rights, which is itself a form of classification.

The classifications – public employee equal protection plaintiffs versus other equal protection plaintiffs; "class-of-one" plaintiffs versus classes of two or more – each involve the right to petition courts for redress, *see Cruz*, 405 U.S. at 321; *California Transport Co.*, 404 U.S. at 510. Thus these judicial classifications are subject to strict scrutiny under the equal protection clause, with *inter alia* its least restrictive means standard, *see City of Cleburne*, 473 U.S. at 439-42, and the presumption against their validity, *see Schad*, 452 U.S. at 64-65, 69-70.These sweeping prohibitions for public employees of already severely limited equal protection remedies – aside from its erroneous premise of practical necessity, *see* Discussion, Section IV.B, *infra* – is inapposite to the norm of limited restrictions of the broadest rights in constitutional jurisprudence. It also raises the potential for pernicious results, such as stripping public employees of all judicial remedies for all non-suspect classes of discrimination.

Clearly, there are less restrictive means of protecting any governmental interest in protecting the efficiency of the governmental workplace without a complete ban of protected speech and petition to the courts for class-of-one rational basis claims. Some have been crafted by other circuits. *See* Section IV.B, *infra*. Strict application of traditional rational basis equal protection jurisprudence will also allay this concern. *See* Section IV.B, *infra*.

## E. The *Engquist* Holding Conflicts With Established Rule That § 1983 Claims Are Never Subject To Any Exhaustion Of State Remedies Requirement Or Subordination To State Remedies

Section 1983 claims are never subject to any requirement of exhaustion of state remedies. *See Patsy v. Board of Regents*, 457 U.S. 496, 501-506, 513-514, 516 (1982). *Accord, Heck v. Humphrey*, 512 U.S. 477, 483 (1994). Were that otherwise, the exhaustion requirement would actually serve to bar federal claims because of the preclusive effect of the state proceedings. *See Elliott v. Tennessee*,478 U.S. 78/8, 794-99 (1986).

The *Engquist* holding justifies what may become a complete ban on employee rational basis equal protection claims under § 1983 by noting that public employees have available other state and local administrative or judicial remedies. *See Engquist*, 485 F.3d at 995 & n.3. However, § 1983 and its mandate for federal judicial remedies do not permit a requirement of exhaustion of state remedies, *see Patsy*, 457 U.S. at 501-506, nor an absolute bar to seeking such federal judicial remedies because of availability of state remedies[3], *see Monroe v. Pape*, 365 U.S. 167, 174-84 (1961) (§ 1983 relief is supplemental to state remedies; holding).

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3. Nor do procedural due process cases which focus on the availability and adequacy of state remedies have any bearing on this analysis, because in such procedural due process cases, one element is the claimed denial of required process, and hence evidence to the contrary is plainly relevant to that constitutional inquiry. *See e.g. Daniels v. Williams*, 474 U.S. 327, 330-33 (1986); *Hudson v. Palmer*, 468 U.S. 517, 533-36 (1984); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37 (1982); *Parratt v. Taylor*, 451 U.S. 527, 539-42, 544 (1981).

## IV.

## EVEN CIRCUIT RULES IMPOSING LESS RESTRICTIVE SPECIAL BURDENS FOR PUBLIC EMPLOYEE CLASS-OF-ONE RATIONAL BASIS EQUAL PROTECTION § 1983 CLAIMS ARE NOT WARRANTED IN LIGHT OF HIGHLY RESTRICTIVE REQUIREMENTS FOR ALL RATIONAL BASIS CLAIMS

As further discussed in this Section IV, the evolution of the standards employed to handle constitutional claims under 42 U.S.C. § 1983 – from the initial analogous tort model to the underlying constitutional text model, combined with (a) the highly restrictive test for any rational basis equal protection claim and (b) the specific intent requirement for all equal protection claims, make any special restrictions for class-of-one claims unnecessary as a matter of policy and application of the least intrusive means test which applies when a classification impacting the fundamental right to petition for redress of grievances, *see* Discussion, Section III, *supra.*

## A. The Analogous Tort Model For 42 U.S.C. § 1983 Has Been Subordinated To The More Defined Incorporated Constitutional Text Model

### 1. Commencing In 1961 Federal Courts Construed Claims Under 42 U.S.C. § 1983 Primarily By The Analogous Tort Model

Commencing with the Supreme Court decision in 1961 in *Monroe*, 365 U.S. at 174-84, the primary methodology for ascertaining elements for damages claims under § 1983 was to look to the most analogous common law tort action. "In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871). . . ." *Smith v. Wade*, 461 U.S. 30, 34 (1983). *Accord, Heck*, 512 U.S. at 484-86.

> Over the centuries the common law of torts . . . defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.

*Carey v. Pyphus*, 435 U.S. 247, 257-58 (1978).

### 2. The Analogous Tort Model Culminated In A Negligent *Scienter* Rule In *Paratt v. Taylor* Which Engendered Conflicting Rulings In 42 U.S.C. § 1983 Jurisprudence

Use of the analogous tort model eventually compelled the Supreme Court to determine whether § 1983 could provide a remedy for a claim wherein the alleged *scienter* is mere negligence, and in *Paratt v.*

*Taylor*, 451 U.S. 527 (1981) the Court opined that indeed a negligent act could in some cases form the basis for a § 1983 claim. *See Paratt*, 451 U.S. at 534-35. This occurred in the wake of *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (§ 1983 provides remedy for deprivation of federal statutory as well as constitutional rights) and earlier concerns that § 1983 not become a vehicle for a generalized federal tort remedy for all torts committed by state or local officials, *see, e.g., Paul v. Davis*, 424 U.S. 693, 698-700 (1976).

Hence, the *Parratt* ruling almost immediately generated a serious problem: how to avoid § 1983 becoming a generalized federal tort remedy for all commonplace negligence torts committed by any and all state and local public officials. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37 (1982) (placing boundaries on *Parratt* with due process claims); *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984) (same).

### 3. *Paratt* Problems Were Resolved By Supreme Court Adoption Of The Incorporated Constitutional Text Model Which Is Now The Predominant Framework For 42 U.S.C. § 1983 Claims

The Supreme Court finally resolved the *Parratt* problem by moving in a different direction. It retrenched on its *Paratt* "negligence" ruling, and instead adopted the alternative formulation suggested in a concurring opinion by Justice Powell in *Parratt*: the proper test for determining elements of claims under § 1983 should be to look to the federal constitutional or statutory right

allegedly deprived, and incorporate the elements for violation of that particular federal right.

> The central question in this case is whether *unintentional* but negligent acts by state officials, causing respondent's loss of property, are actionable. . . . [T]his question requires the Court to determine whether intent is an essential element of a due process claim, just as we have done in cases applying the Equal Protection Clause . . . and the Eighth Amendment's prohibition of "cruel and unusual punishment." . . . . The intent question cannot be given "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action," [citation omitted]. Rather, we must give close attention to the nature of the particular constitutional violation asserted, in determining whether intent is a necessary element of such a violation. . . . [S]uch a rule would avoid trivializing the right of action provided in § 1983.

*Parratt*, 451 U.S. at 547-48 & nn.2-7 (J. Powell, concurring). *Compare Daniels v. Williams*, 474 U.S. 327, 330-33 (1986) (requiring specific intent *scienter* in due process claims under § 1983 as previously established element of underlying constitutional provision); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (same).

This restored § 1983's grounding in the underlying federal right being deprived. By focusing the analysis on the underlying federal constitutional provision and its established elements, the test eschewed initial

reliance upon analogous torts arising from state law rights, and hence eliminated the attendant risk of converting § 1983 into a generalized federal tort remedy with the feared consequential flood of tort claims against public officials. This benefit was immediately felt in *Daniels* and *Davidson* wherein claimed wrongs were negligent handling of prisoner property or custody, and the sole federal rights implicated were deprivation of property or liberty without due process of law, with its previously established specific intent requirement, *see Daniels*, 474 U.S. at 330-33; *Davidson*, 474 U.S. at 347.

This underlying constitutional text model has been extended to a variety of § 1983 claims, buttressed by parallel reasoning that restricted reliance on substantive due process and its potential for incorporating rights not grounded in specific federal constitutional or statutory provisions. *See, e.g., Graham v. Connor*, 490 U.S. 386, 394 (1989) (excessive police force claims; 4th Amendment for unreasonable seizures); *Albright*, 510 U.S. at 271 n.4 (same for malicious criminal prosecution).

The analogous tort model has not been abandoned, but resort thereto is now limited to situations wherein there is a manifest intent of some federal enactment to protect against some harm, but no adequate pre-existing formulation for that federally established right. *See, e.g., Heck*, 512 U.S. at 482-84 (analogous tort model for malicious prosecution re post-conviction claim; 4th Amendment inapplicable); *Wyatt v. Cole*, 504 U.S. 158, 164-67 (1992) (common law principles for malicious prosecution based on civil action). The same is true for substantive due process. *Compare Brower v. County of*

*Inyo*, 489 U.S. 593, 596-97 (1989) (4th Amendment requires proof that seizure occurred "through means intentionally applied") *with County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998) (*Brower* test not met when interference with seizure results from police vehicular accident, so substantive due process applicable).

### B. The Test For 42 U.S.C. § 1983 Rational Basis Equal Protection Claims Should Derive From The Existing Elements Of Equal Protection Rights Under Fourteenth Amendment Rational Basis Standard

The courts have applied the rational basis test for claimed deprivation of equal protection of the laws occurs when the classification at issue does not implicate strict scrutiny – *i.e.* no suspect classification [*e.g.* race or national origin] or any fundamental right [*e.g.* First Amendment rights], or heightened scrutiny [*e.g.* gender or "illegitimacy"], *see City of Cleburne*, 473 U.S. at 439-42. In so doing, this Court has ruled that a rational basis equal protection § 1983 claim can be maintained even where the plaintiff represents a mere "class-of-one." *See Village of Willowbrook*, 528 U.S. at 564.

Once again, as with *Parratt*, there are policy concerns about federal judicial review of virtually all government acts which distinguish one person from another person or group, especially in public employment. *See Village of Willowbrook*, 528 U.S. at 565-66 (J. Breyer, concurring); *Lauth*, 424 F.3d at 633-34; *Jennings*, 383 F.3d at 1210-11 & n.4. Courts, as with *Parratt*, have sought to remedy this by grafting various

additional restrictive elements to "class-of-one" claims. *See e.g. Levenstein*, 414 F.3d at 775-76 (requiring proof that differentially treated classes are otherwise "identical in all respects"); *Neilson*, 409 F.3d at 104 & n.3 (requiring greater proof of similarity between compared classes); *Jennings*, 383 F.3d at 1211 (noting circuits which require added malice or ill will element).

Once again, as occurred ultimately with *Parratt*, the solution to this concern is the proper application of the underlying constitutional text model, per *Williams*, *Davidson* and *Connor*, not the grafting of additional special tests for rational basis equal protection § 1983 claims.

As previously mentioned, at least three (3) circuits – the Fifth, Sixth and a divided Seventh – have invoked the underlying constitutional text model[4], simply applying the highly restrictive objective standard of the equal protection rational basis standard as discussed in Section IV.B, *infra*. *See Scarborough*, 470 F.3d at 261; *Whiting*, 451 F.3d at 348-49 & n.3; *Lauth*, 424 F.3d at 634.

The *Lauth* Court, after stating that "we decline to rule that a public employee can *never* maintain a class-of-one case," *Lauth*, 424 F.3d at 634, added:

> [A] plaintiff who does not belong to any suspect (that is favored) class – by definition

4. Two other circuits – First & Third – invoked standard equal protection analysis, but with little discussion beyond the specific facts of the case. *See Hill*, 455 F.3d at 239; *Campagna*, 334 F.3d at 156.

> the situation of a class-of-one plaintiff – must to prevail, "negative any reasonably conceivable state of facts that could provide a rational basis for the classification." [Citations omitted]. "Governmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized." [Citation omitted]. . . . [T]he target of class-of-one cases is "governmental action wholly impossible to relate to legitimate governmental objectives." [Citations omitted]. Animus thus comes into play only when, no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff, the action would be inexplicable unless animus had motivated it.

*Lauth*, 424 F.3d at 634[5]. *Accord*, *Scarborough*, 470 F.3d at 261 (same); *Whiting*, 451 F.3d at 348-49 & n.3 (same). The key is the initial focus on whether there is any reasonably conceivable rational basis, objectively determined, for the classification which served as the basis for differential treatment.

Thus, as prescribed in *Lauth*, applying the Supreme Court's underlying constitutional text model to rational basis equal protection § 1983 claims means reference first of all to the Fourteenth Amendment equal protection jurisprudence governing the objective rational basis test; and if that suffices to provide the necessary elements for

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5. *But see Levenstein*, 414 F.3d at 775-76 (adding additional element of proof to standard rational basis test).

such remedy claims, only then to assess the intent or animus requirement in all discrimination claims. *See* Discussion, Section IV.B, *infra*.

### 1. The Rational Basis Equal Protection Formula Sets An Extremely High Threshold Standard Under Which State Classifications Are Unlawful If Lacking Any Reasonably Conceivable Rational Basis

> The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. [Citation omitted]. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. [Citations omitted].

*Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-72 (1979).

When applicable, the rational basis test under the equal protection clause sets the bar very high for any party challenging a classification under color of state law. The validity of a government classification is presumed so long as it is drawn to be "rationally related to a legitimate state interest." *See City of Cleburne*, 437 U.S. at 440. "[T]he

Equal Protection Clause requires only a rational means to serve a legitimate end." *see City of Cleburne*, 437 U..S. at 442. *Accord, Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). "[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification' [citations omitted]." *Heller v. Doe*, 509 U.S. 312, 320 (1993). "'[T]he burden is on one attacking the [classification] to negative every conceivable basis which might support it. . . [citation and internal quotation marks omitted]." *Heller*, 509 U.S. at 320. *Accord, Board of Trustees of University of Alabama*, 531 U.S. at 367; *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) ("classification rests on grounds wholly irrelevant to the achievement of the State's objective"). Because this standard focuses on "reasonably conceivable" rationales which "could" have been the basis for the classification. *see Heller*, 509 U.S. at 320; *Board of Trustees of University of Alabama*, 531 U.S. at 367; *FCC*, 508 U.S. at 313, and because the courts eschew second-guessing governmental classifications that are not suspect, *see Heller*, 509 U.S. at 319-21; *FCC*, 508 U.S. at 315-16 & n.7, this test is necessarily an objective one, *see San Antonio Independent School Dist.*, 411 U.S. at 60 ("discrete and **objectively verifiable** classes;" "any state of facts **reasonably** may be conceived to justify it") (emphasis added).

It is at this latter stage that the issue of "pretext" arises when there is a dispute as to what was the actual classification factor – *e.g.* citing business reasons as the classifying factor when excluding a socially disapproved group not protected by strict scrutiny. *See Personnel Administrator of Massachusetts*, 442 U.S. at 272 (right to refute classification that is ostensibly neutral but is pretext for unlawful discrimination); *Squaw Valley Development Co.*, 375 F.3d at 944, 945-46 (same); *Armendariz*, 75 F.3d at 1327 (same). Once it is established that a forbidden classification has occurred, under whatever test, finding a violation of the Fourteenth Amendment prohibition of unequal treatment requires proof that the government actor intended to discriminate, that it was a purposeful discrimination. *See Personnel Administrator of Massachusetts*, 442 U.S. at 272; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). "[E]ven if a neutral law has a disproportionately adverse effect upon [a classified group], it is unconstitutional only if that impact can be traced to a discriminatory purpose." *Personnel Administrator of Massachusetts*, 442 U.S. at 272. *Accord, Seariver Maritime Financial Holdings, Inc.*, 309 F.3d at 679.

Thus, the test for establishing a constitutionally forbidden deprivation of equal protection of the law under color of law, when applying the rational basis test, imposes a duty on the claiming party to prove (a) first that there is no reasonably conceivable rational basis for the challenged classification – *i.e.* no reasonably conceivable rational relationship to no reasonably conceivable legitimate state objective – and then (b) that

any adverse impact on the classified group to which plaintiff belongs was intentional or purposeful discrimination against that class. If that very standard were to be deemed incorporated into all § 1983 rational basis equal protection claims – per *Williams*, *Davidson* and *Connor* – the bar would be set sufficiently high to preclude the perceived risks of judicial second-guessing of state and local governmental decision-making, or of a flood of litigation thereunder, whether in or out of the employment context. A plaintiff asserting such a § 1983 claim would have to plead the objective absence of any reasonably conceivable rational basis, and a court will be able to readily assess as a matter of law whether there is in fact any reasonably conceivable rational basis, especially where the fact of the classification is not in issue, only whether it is legitimate.

### 2. Use Of Fourteenth Amendment Equal Protection Rational Basis Test And Proper Treatment Of Extraneous Concepts And Unnecessarily Broad Terms Would Resolve Public Policy Concerns

If § 1983 claims for unlawful classifications are assessed under the rational basis test and carefully adhere to the well-established standard for the constitutional text, *see* Discussion, Section IV.B., *infra*, there would be no uncertainty in those claims nor would there be any danger of overbreadth of application. To the extent such problems do in fact exist, or are fairly anticipated, they arise from confusion about the pretext issue, imprecision of language or reliance upon formulations extraneous to the relevant constitutional text.

Thus, for instance, some cases assume that invocation of a "class of one" means that there is an equal protection remedy without need for proof of a subject class or classification at all. *See Neilson*, 409 F.3d at 104; *Jennings*, 383 F.3d at 1210. This is plainly illogical – *i.e.* an employer might discriminate against left-handedness or anyone not sharing his bed, with evidence of only one affected left-handed person, and this would be a "class of one." These courts overlook the fact that the salient issue is whether there is a classification that differentiates plaintiff from others in terms of some form of employer treatment.

Meanwhile, the pretext issue – which is not an element of an equal protection claim – sometimes becomes factually central to such claims. *See Personnel Administrator of Massachusetts*, 442 U.S. at 272 (citing "classification that is ostensibly neutral but is an obvious pretext for [unlawful] discrimination"). Similarly, rational basis equal protection decisions sometimes contain *dictum*, or cite allegations in the complaint, or discuss matters ancillary to the governing test, using the term[s] "arbitrary," "wholly or plainly arbitrary," "arbitrary and/or capricious" or "malicious" with inexactitude – indeed, they cannot even agree whether it should be "arbitrary **and** capricious" or "arbitrary **or** capricious." *See e.g. Village of Willowbrook*, 528 U.S. at 565 (complaint stated equal protection claim by alleging state action was "irrational and wholly arbitrary"); *City of Cleburne*, 473 U.S. at 446 ("State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 53, 60 (appellants urge system is

"unconstitutionally arbitrary;" "Equal Protection Clause is offended only by . . . classifications that are wholly arbitrary or capricious").

Further confusing the use of the word "arbitrary" in connection with equal protection claims are those cases which view the due process clause as the historic source of remedies for "arbitrary" state action. *See County of Sacramento*, 523 U.S. at 845-46; *Daniels*, 474 U.S. at 331 (and cases cited therein). Then again, other courts have said that the mere fact of "arbitrary" or "capricious" state action does not alone warrant a federal judicial remedy. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) ("arbitrary or unreasonable" state action).

Together or separate, the pretext issue and the use of uncertain terms like "arbitrary" or "capricious" add nothing to the threshold standard of the highly restrictive formulation for the rational basis test except uncertainty and fear of what that uncertainty can produce. Thus, the *Engquist* Opinion fears that the "arbitrary" standard of equal protection will effectively denude "at will" discretionary employer decisionmaking. *See Engquist*, 485 F.3d at 964-66.

That uncertainty and risk can be avoided by proper identification of the pretext issue – as a rebuttal to a denial of discrimination on the alleged criterion; and by making clear that broad and uncertain terms regarding arbitrariness, capriciousness or malice are not a part of or alternative to the actual highly restrictive objective legal standard to be applied under § 1983 equal protection rational basis claims, except as it might relate

to the required purposeful discrimination; or, where it might serve as evidence of a classifying factor which does not meet the rigorous rational basis standard.

When applying the undrlying constitutional text model, feared problems do not arise because plaintiffs will need to plead and prove that there is a classifying factor; an actual differential treatment between classes; either the lack of any reasonably conceivable legitimate rational for the classification or any reasonably conceivable legitimate governmental interest served by the classification; and a subjective intent to discriminate. *See* Discussion, Section IV.B, *supra*.

Except for the last element – *i.e.* intent to discriminate – these elements are subject to an objective test, not based on the actual state of mind of the state actor. *See San Antonio Independent School Dist.*, 411 U.S. at 60 ("**objectively verifiable** classes" and "facts **reasonably** . . . conceived") (emphasis added). Hence, courts usually will be able to assess, on any pleading motion, whether the plaintiff has adequately plead an actual classification, the absence of any reasonably conceivable rational basis for the alleged classification – whether or not implicating a class of one or many – and the absence of any reasonably conceivable legitimate state interest served thereby. In such eventuality, mere allegations of subjective animus would not serve as a bar to dismissal, *see e.g. Jicarilla Apache Nation*, 440 F.3d at 1210 (if there was objectively reasonable basis for defendants actions, court did not err granting summary judgment in favor of Defendants without allowing discovery on question of subjective ill will).

Conversely, forms of class-based discrimination for which there is admission by all parties that there is no conceivable rational basis rationally related to any legitimate state purpose, *see, e.g., Scarborough*, 470 F.3d at 261; *Engquist*, 485 F.3d, 1011-1014 & nn.1 & 3 (J. Reinhardt dissenting)[6], will not obtain *de facto* official judicial sanction in the public employment realm by stripping all federal remedies therefor, based on unjustified fears which should not in any case control constitutional jurisprudence. This remedy thus defined will not excessively or unreasonably impinge upon legitimate "at will" governmental decision-making any more than does the rule that bars other forms of prohibited discrimination or "infringe[ment on] constitutionally protected interests" in the same context. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) ("at will" employment status permits action for any reason or none, so long as it is not done for a legally forbidden reason).

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6. In such cases where there is no dispute over whether even the rational basis test can be satisfied, the defendant does not seek to justify the discriminatory classification, instead merely denying that the classification or differential treatment occurred, or seeking to advance a different permissible classifying factor, in which event the claims turn on the credibility of the parties and disputed claims of pretext.

### C. Under The Least Intrusive Means Test There Is No Basis For Applying Special Restrictions To Public Employee § 1983 Class-Of-One Equal Protection Claims

Even those circuits which merely apply more restrictive rules of pleading or proof for public employee § 1983 class-of-one rational basis equal protection claims, to the extent that they serve to bar some public employee claims which would not be otherwise barred, are making a classification which impacts a fundamental right, thereby invoking strict scrutiny and its least intrusive means test, *see City of Cleburne*, 473 U.S. at 439-42, and the presumption against its validity, *see Schad*, 452 U.S. at 64-65, 69-70. Application of standard rational basis equal protection analysis, *see* Discussion, Section IV.B, *supra*, obviates the necessity for such special tests; and in any event, should only be invoked if the intended constitutionally sanctioned purpose cannot be achieved by less intrusive means.

## CONCLUSION

*Amicus* respectfully joins Petitioner in seeking the overruling of the *Engquist* holding and substituting a traditional constitutional approach under the Fourteenth Amendment equal protection clause. To the extent that any special treatment is deemed necessary and constitutionally warranted under the least intrusive means test of the First Amendment, the Court is urged to look to its existing First Amendment jurisprudence for public employee speech which balances the public interest in governmental employment workplace efficiency against the fundamental rights of public employees to access the courts for judicial remedies for meritorious class-of-one rational basis equal protection claims. In so doing, public employee rights to seek redress of remedies under the equal protection clause, under any standard, can be fully preserved fully consistent with the overall public interest, which interest is also served by judicial remedies for discrimination for bidden by the Fourteenth Amendment equal protection clause.

Respectfully submitted,

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